

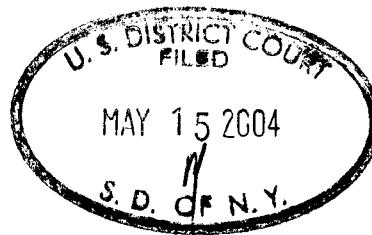
EXHIBIT A

14 MAG 1064 D ORIGINAL

Approved: _____

James J. Pastore, Jr.
Assistant United States Attorney

Before: HONORABLE DEBRA FREEMAN
United States Magistrate Judge
Southern District of New York



----- x
 UNITED STATES OF AMERICA : SEALED COMPLAINT
 :
 - v. - : Violation of
 : 18 U.S.C. §§ 1030, 1029
 : and 2
 KYLE FEDOREK, :
 a/k/a "kbello," :
 : COUNTY OF OFFENSE:
 Defendant. : New York
 :
 ----- x

SOUTHERN DISTRICT OF NEW YORK, ss.:

NAVIN KALICHARAN, being duly sworn, deposes and says that he is a Special Agent with the Federal Bureau of Investigation ("FBI") and charges as follows:

COUNT ONE
(Conspiracy to Commit Computer Hacking)

1. From at least in or about September 2012, up to and including in or about March 2014, in the Southern District of New York and elsewhere, KYLE FEDOREK, a/k/a "kbello," the defendant, and others known and unknown, knowingly and willfully combined, conspired, confederated, and agreed together and with each other to engage in computer hacking, in violation of Title 18, United States Code, Section 1030(a)(5)(A).

2. It was a part and an object of the conspiracy that KYLE FEDOREK, a/k/a "kbello," the defendant, and others known and unknown, knowingly and willfully would and did cause the transmission of a program, information, code and command, and, as a result of such conduct, would and did intentionally cause damage without authorization, to a protected computer, and would and did cause damage affecting 10 and more protected computers during a one-year period, in violation of Title 18, United States Code, Sections 1030(a)(5)(A), 1030(c)(4)(B)(i) and (c)(4)(A)(i)(VI), to wit, FEDOREK purchased malicious software,

or "malware," from an entity known as Blackshades and, relying on servers maintained by that organization, used the malware to infect victims' computers and steal information, including financial account information.

Overt Acts

3. In furtherance of the conspiracy and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On or about September 12, 2012, KYLE FEDOREK, a/k/a "kbello," purchased a copy of malicious software known as "Blackshades" over the Internet.

b. On or about June 30, 2010, a co-conspirator transmitted a copy of malicious software known as "Blackshades" to an FBI Special Agent located in New York, New York who was acting in an undercover capacity.

c. In or about 2013, an FBI Special Agent located in New York, New York purchased a copy of malicious software from a website maintained by Blackshades.

(Title 18, United States Code, Section 1030(b).)

COUNT TWO
(Computer Hacking)

4. From at least in or about September 2012, up to and including in or about March 2014, in the Southern District of New York and elsewhere, KYLE FEDOREK, a/k/a "kbello," the defendant, caused the transmission of a program, information, code and command, and, as a result of such conduct, intentionally caused damage without authorization, to a protected computer, and caused damage affecting 10 and more protected computers during a one-year period, in violation of Title 18, United States Code, Sections 1030(a)(5)(A), 1030(c)(4)(B)(i) and (c)(4)(A)(i)(VI), to wit, FEDOREK used malicious software, or "malware," including Blackshades malware, to infect victims' computers and steal information, including financial account information.

(Title 18, United States Code, Sections 1030(a)(5)(A), 1030(c)(4)(B)(i) and (c)(4)(A)(i)(VI), and 2.)

COUNT THREE
(Access Device Fraud)

5. From at least in or about September 2012, up to and including in or about March 2014, in the Southern District of New York and elsewhere, KYLE FEDOREK, a/k/a "kbello," the defendant, knowingly and with intent to defraud possessed fifteen and more access devices which were counterfeit and unauthorized access devices, to wit, FEDOREK possessed at least thousands of access devices, including credit card numbers and financial account numbers, which were obtained through computer hacking.

(Title 18, United States Code, Sections 1029(a)(3) and 2.)

The bases for my knowledge and for the foregoing charge are, in part, as follows:

6. I have been personally involved in the investigation of this matter. This affidavit is based upon my investigation, my conversations with other law enforcement agents, and my examination of reports and records. Because this affidavit is being submitted for the limited purpose of establishing probable cause, it does not include all the facts that I have learned during the course of my investigation. Where the contents of documents and the actions, statements, and conversations of others are reported herein, they are reported in substance and in part, except where otherwise indicated.

7. I have been a Special Agent with the FBI since approximately February 2009. Since approximately June 2013, I have been assigned to a computer intrusion squad in the FBI's New York Field Office. I have received training regarding computer technology, computer fraud, and white collar crimes. I have participated in the arrests of multiple individuals suspected of engaging in cybercrimes.

Overview

8. Since at least in or about 2010, an organization known as "Blackshades" has sold and distributed malicious software to thousands of cybercriminals throughout the world. Blackshades' flagship product was the Blackshades Remote Access Tool, or R.A.T. (the "RAT"), a sophisticated piece of malware that enabled cybercriminals to remotely and surreptitiously gain control over a victim's computer. After installing the RAT on a victim's computer, a user of the RAT had free rein to, among other things, access and view documents, photographs and other files on the victim's computer, record all of the keystrokes entered on the victim's keyboard, steal the passwords to the victim's online

accounts, and even activate the victim's web camera to spy on the victim -- all of which could be done without the victim's knowledge.

9. The FBI's investigation has shown that the RAT was purchased by at least several thousand users in more than 100 countries and used to infect more than half a million computers worldwide. The FBI's investigation has included, among other things, the execution of physical search warrants and more than 100 e-mail search warrants, the seizure of more than 1,900 domain names used by purchasers of the RAT to control victims' computers, and the execution of a search warrant for a computer server controlled by Blackshades. Further, an undercover FBI agent in New York, New York obtained a copy of the RAT from one of the RAT's co-creators, who subsequently cooperated with the Government and provided extensive information about Blackshades ("CW-1").¹ The FBI's investigation has revealed that the Blackshades RAT was, in fact, used by Blackshades customers to, among other things, activate web cameras, steal files and account information, and log keystrokes.

10. KYLE FEDOREK, a/k/a "kbello," the defendant, was a customer of Blackshades who purchased the RAT in or about September 2012. From in or about September 2012 through in or about March 2014, when the FBI executed a search warrant at FEDOREK's home and seized his computer, FEDOREK used the RAT to steal financial and other account information from more than 400 victims. As detailed below, a search of FEDOREK's computer also revealed that FEDOREK was deploying a variety of other types of malicious software against his victims.

Background on the Blackshades RAT

11. The Blackshades RAT was advertised and discussed, among other places, on online forums for computer hackers. Copies of the RAT were available for sale, typically for \$40 each, on the Blackshades website, which was located at, among

¹ CW-1 was arrested in June 2012 as part of a Government investigation known as "Operation Cardshop." In January 2013, CW-1 pled guilty to two counts of violating Title 18, United States Code, Section 1030 (computer hacking) pursuant to a cooperation agreement with the Government, in the hopes of obtaining a reduced sentence. CW-1 has proven to be reliable, and the information that CW-1 has provided has been corroborated by, among other things, emails and other information seized pursuant to search warrants, as well as logs of online chats seized from CW-1's computer.

other domains, www.blackshades.ru and www.bshades.eu (the "Blackshades Website"). The RAT was typically advertised as a product that conveniently combined the features of several different types of hacking tools. For instance, one online advertisement read:

Deciding between a RAT, a host booter, or controlling a botnet has never been easier.² With Blackshades . . . you get the best of all three - all in one with an easy to use, nice looking interface.

Even better, Blackshades . . . does a lot of work for you - it can automatically map your ports, seed your torrent for you, and spread through AIM, MSN, ICQ and USB devices.

12. Based on my review of the Blackshades software, as well as information provided by CW-1, I know that, after purchasing a copy of the RAT, in order to use it, a user had to install the RAT on a victim's computer - i.e., "infect" a victim's computer. The infection of a victim's computer could be accomplished in several ways, including:

a. by tricking victims into clicking on malicious links contained in emails sent to them;

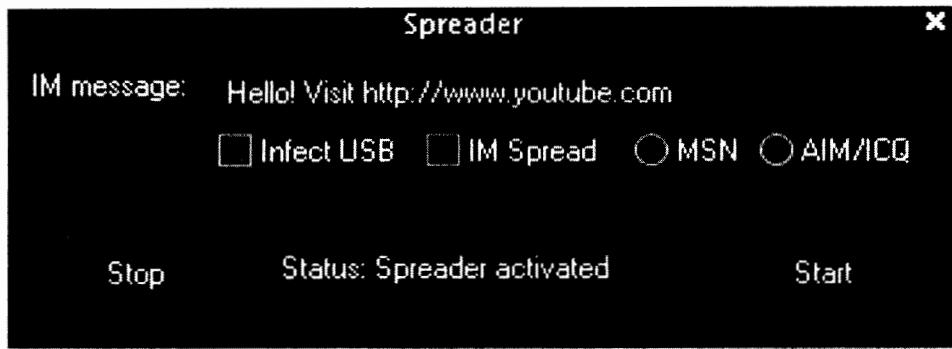
b. by convincing victims to click on links for videos or to visit websites that caused the malware to be installed; or

c. by hiring others to install the RAT on victims' computers, which at times Blackshades itself offered to do on behalf of its customers for an additional fee.

13. The RAT also contained tools known as "spreaders" that helped users of the RAT infect victim computers. The spreader tools generally worked by using computers that had already been infected to help spread the RAT further to other computers. For instance, as depicted below, in order to lure people to click on malicious links that would install the RAT on their computers, the RAT allowed users to send those malicious links to others via

² A "host booter" is a tool that can be used to launch a denial of service (or "DoS") attack, typically in the context of online video games. It disconnects or "boots" a person from a "host" (e.g., an online video game platform) and is typically done to cheat at the video game. A "botnet" typically refers to a network of infected computers or "bots."

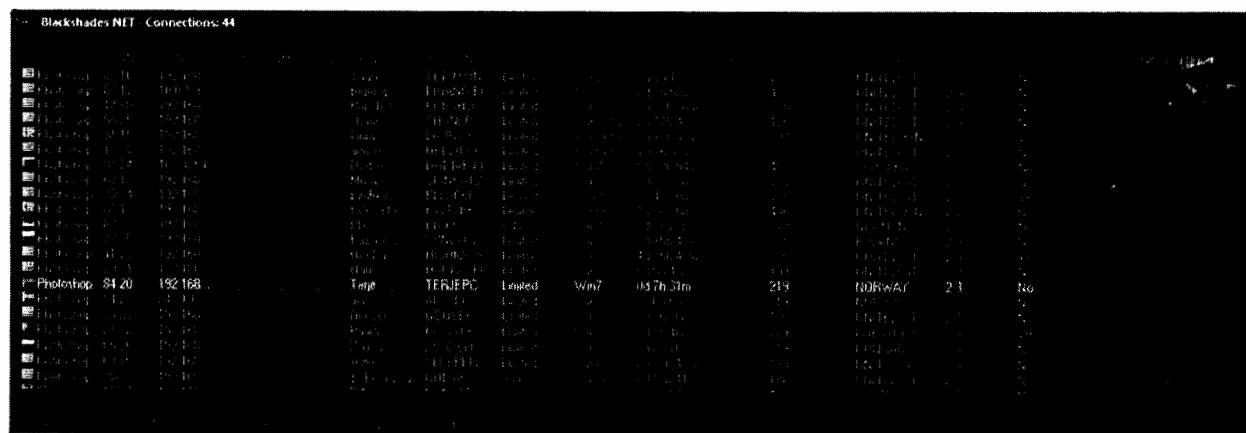
a victim's social media service, making it appear as if the message had come from the victim's compromised computer:



In this example, the user of the RAT has set the RAT to be spread through a malicious link that would be sent to others via the victim's instant messaging, or IM, services. In this case, the victim's social contacts would receive an IM message (purportedly from the victim), saying "Hello!" and inviting them to click on a link that appeared to lead to the YouTube website. In this way, the victim's friends might be fooled into clicking on the link purportedly sent by the victim, which would in fact install the RAT on that person's computer.

As can be seen above, the RAT's spreader feature also provided users an option to "Infect USB," which would infect any device plugged into a USB port on the victim's computer, such as a thumb drive. In this way, the malware could be spread between two computers through use of a thumb drive (e.g., a person's home and work computers).

14. The RAT also featured a graphical user interface, which allowed cybercriminals to easily view and navigate all of the victim computers that they had infected:



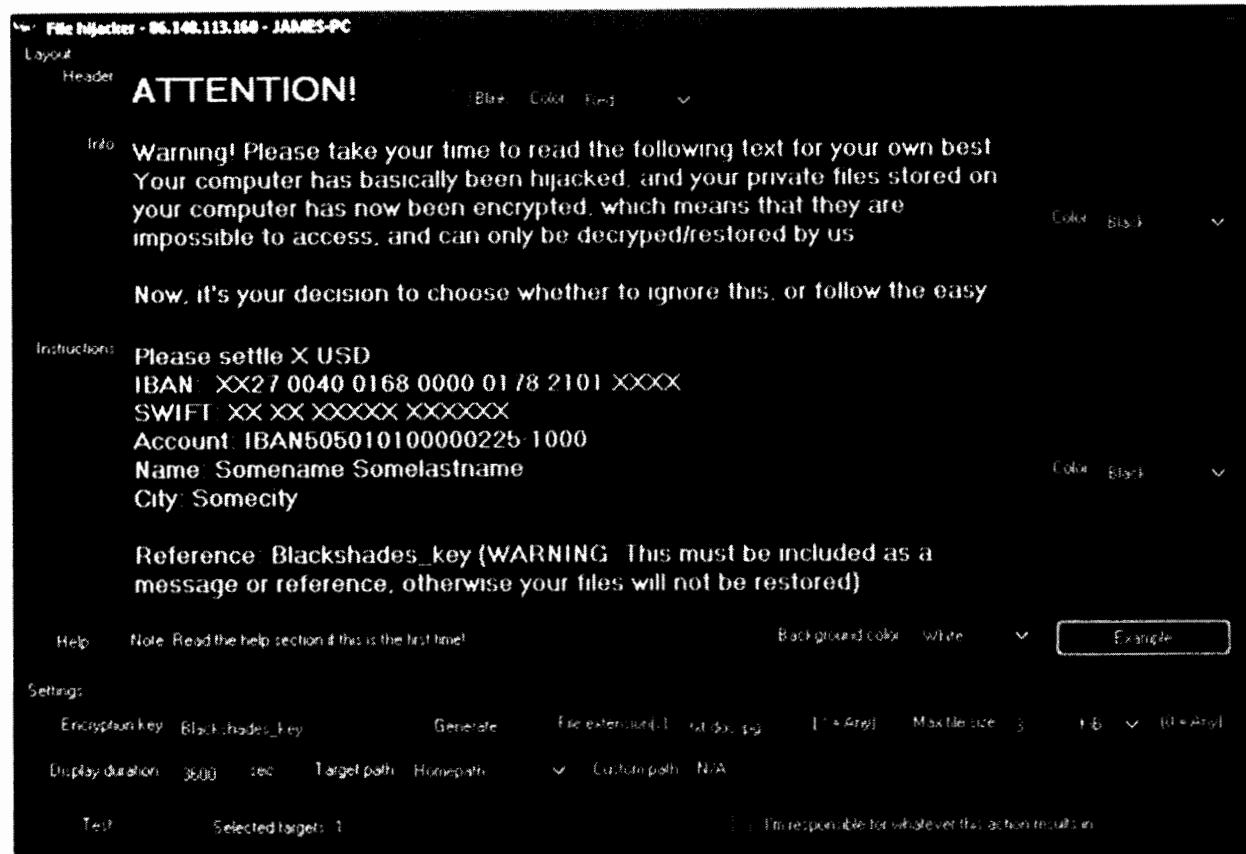
Among other things, the user interface³ listed IP address information for each infected computer, the computer's name, the computer's operating system, the country in which the computer was located, and whether the computer had a web camera.

15. Once a computer was infected with the RAT, the user of the RAT could remotely activate the victim's web camera. By doing so, the RAT user could take photographs or obtain a live feed from the infected computer's web camera. In this way, the user could spy on anyone within view of the victim's webcam inside the victim's home or in any other private spaces where the victim's computer was used.

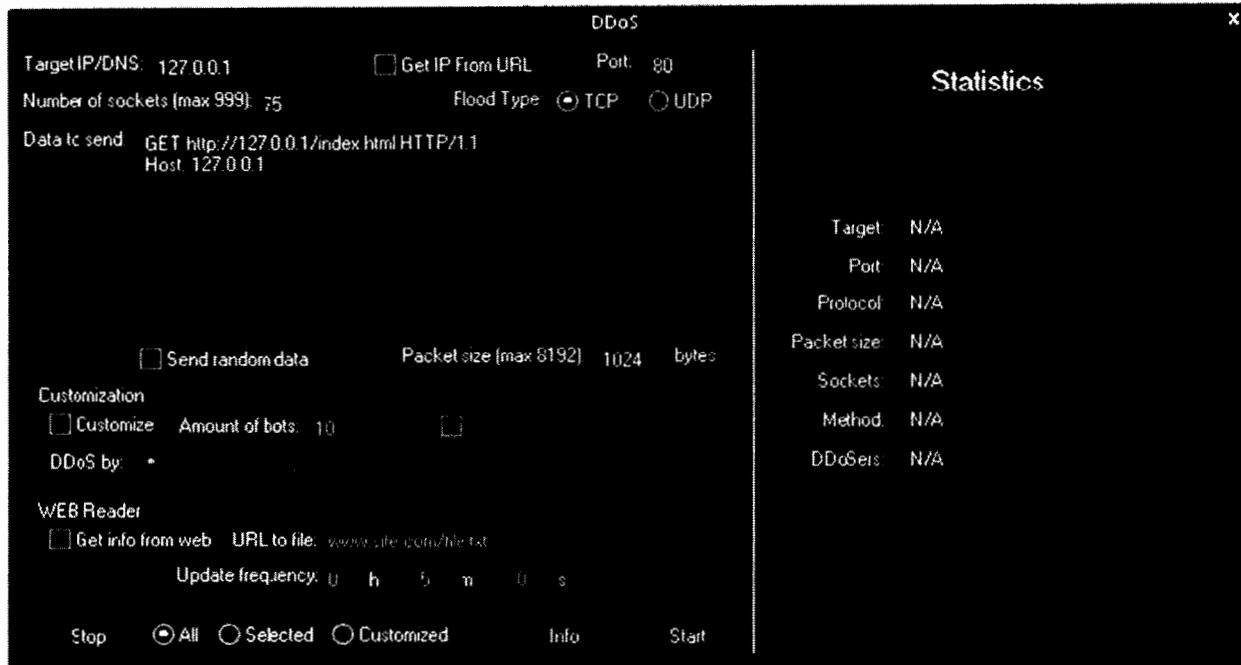
16. The RAT also contained a "keylogger" feature that allowed users to record each key that victims typed on their computer keyboards. To help users steal a victim's passwords and other log-in credentials, the RAT also had a "form grabber" feature. The "form grabber" automatically captured log-in information that victims entered into "forms" on their infected computers (e.g., log-in screens or order purchase screens for online accounts).

17. The RAT also provided its users with complete access to all of the files contained on a victim's computer. A RAT user could use such access to view or download photographs, documents, or other files on a victim's computer. Further, using a tool known as "file hijacker," the RAT enabled users to encrypt, or lock, a victim's files and demand a "ransom" to unlock them. This "ransomware" feature of the RAT included a pre-drafted ransom note that could be sent to victims:

³ A copy of the interface is attached hereto as Exhibit A.



18. The RAT also allowed users to exploit victims' computers to launch other cyber attacks. Infected computers – which, as noted above, are sometimes referred to as "bots" – could be gathered into a network known as a "botnet." The botnet could then be used to launch Distributed Denial of Service ("DDoS") attacks against particular websites by repeatedly sending requests to the website in an effort to disable the website and deny service to legitimate customers. The RAT included a special DDoS tool that simplified the process of launching DDoS attacks using infected computers:



19. The RAT also included several features that were designed to harass or frighten victims. One feature, for example, allowed RAT users to "talk" to a victim through the victim's own infected computer by using the computer's "speech to text" feature. That is, a RAT user could type a message to the victim, and the victim's computer would read the message aloud. Another feature of the RAT caused an online chat window to appear on a victim's computer, through which the RAT user could type messages to the victim. The victim was unable to close, move, or otherwise remove the chat window.

Other Blackshades Products and Services

20. Based on the FBI's review of the Blackshades Website, as well as information provided by CW-1, I know that, in addition to the RAT, Blackshades has also sold Blackshades Crypter, a program designed to make the RAT undetectable by anti-virus software; Blackshades Stealth, a version of the RAT coded in certain programming languages that allowed the RAT to be controlled by Macs in addition to PCs; and Blackshades Fusion, malicious software designed to steal passwords, launch DDoS attacks, and capture webcam feeds, among other things.

21. Based on the FBI's review of a server controlled by Blackshades (the "Blackshades Server"), a copy of which was obtained by the FBI pursuant to a search warrant, I know that the Blackshades Server stored usernames and passwords of victims that had been stolen using Blackshades products. A Blackshades

customer could access and download to his or her computer the stolen usernames and passwords by logging into his or her Blackshades account.

22. From speaking with CW-1 and from reviewing the Blackshades Website, the FBI has also learned that from time to time Blackshades has provided a service known as a "Virtual Private Network" or "VPN." Based on my training and experience, I know that VPNs can be used to obscure the true IP address of a computer. Accordingly, cybercriminals often use VPNs to make it more difficult for law enforcement to identify their true IP addresses and physical locations.

The Blackshades Organization

23. Based on information provided by CW-1 and other witnesses, as well as records obtained pursuant to search warrants, I know that Blackshades operated as a business, which was owned and operated by Alex Yucel, a/k/a "marjinz." Among other things, Yucel hired and fired employees, paid employees' salaries, and updated the malicious software in response to customers' comments and requests. To facilitate the operations of the Blackshades organization, Yucel employed several paid administrators, including a director of marketing, website developer, customer service manager, and a team of customer service representatives. In addition to running the Blackshades organization, Yucel - along with CW-1 - created the RAT.

24. Based on the FBI's review of the Blackshades Website, information provided by CW-1, and records obtained pursuant to search warrants, I know that Blackshades maintained a customer support forum on its website and had a customer support email address. Customer complaints were opened as "trouble tickets," and would be answered by one of several paid customer service representatives. The Blackshades Server included employee reviews written by Yucel, as well as records reflecting payments made to employees.

25. Records obtained from various electronic payment processors show that Blackshades generated sales of more than \$350,000 between September 2010 and April 2014.

The FBI's Identification of Blackshades Users and Seizure of Domains Used to Control Victim Computers

26. According to information provided by CW-1, customers who wished to use the RAT were required to set up an account with Blackshades that included a username and password. In addition, to deploy the RAT, each Blackshades customer was required to

determine how his victims' computers would communicate with his computer. Typically, RAT users set up their accounts so that their victims' computers would communicate with a particular domain name, such as www.example.com. That domain name, in turn, was associated with the IP address of the RAT user's computer through the Domain Name System, or DNS.⁴

27. According to CW-1, when a Blackshades customer set up the RAT, the Blackshades Server logged the domain name to which that customer directed his victims' computers. This information was maintained in one or more database tables on the Blackshades Server. As indicated above, the Government seized a copy of the Blackshades Server pursuant to a search warrant. The copy of that server contained database tables that reflected the usernames and passwords associated with Blackshades accounts, as well as the domain names to which Blackshades users directed their victims' computers.

28. Records obtained from the Blackshades Server and other documents showed that there were more than 6,000 Blackshades customer accounts.⁵ Based on information users provided to Blackshades, those users were located in more than 100 countries.

29. As part of the Government's investigation, the Government obtained a court order authorizing the seizure of more than 1,900 domain names used by certain Blackshades customers to control infected computers. By doing so, the FBI disabled communications between those infected computers and the RAT users that had infected them. The court order also authorized the FBI to obtain IP address information for computers trying to communicate with the seized domain names, to enable the FBI to identify and facilitate notification to victims regarding the infections.

FEDOREK's Purchase and Use of the Blackshades RAT

30. In or about February 2013, the Government obtained a warrant to search the email account blackshadessupport@hotmail.com (the "Blackshades Email Account"),

⁴ Based on my training and experience, I know that DNS is the system through which an easily memorable domain name (e.g., www.doj.gov) is translated - or "resolved" - into an IP address (e.g., 149.101.1.3), thus allowing information to be transmitted between computers.

⁵ The number of customer accounts does not necessarily reflect the number of unique users, because a single user could have maintained multiple accounts.

which was used by Yucel to, among other things, communicate with Blackshades employees. The Government's search of the Blackshades Email Account also revealed communications with and/or concerning Blackshades customers, including: (1) email correspondence to and from customers seeking technical support for Blackshades products and services, and (2) electronic receipts reflecting purchases of Blackshades products and services by customers. Those electronic receipts sometimes contained contact information for the Blackshades customer, including email address information.

31. One of the emails I reviewed pursuant to the email search warrant described above was an email dated September 12, 2012, sent from an electronic payment processor (the "Payment Processor") to the Blackshades Email Account. That email shows, among other things, that:

a. On or about September 12, 2012, "Kyle Fedorek" purchased "Blackshades Remote Controller (R.A.T)" for "40.00 USD."

b. FEDOREK provided the Payment Processor an address of a residence in Stony Point, New York as his address (the "FEDOREK RESIDENCE").

32. Pursuant to the search of the Blackshades Server described above, the FBI recovered a database table reflecting the domain names used by Blackshades customers to control their victims' computers. That database table indicated that the user "KBello" had set up several copies of the RAT to communicate with various domain names, including kbella.zapto.org and kbello.zapto.org. Based on records obtained pursuant to subpoena, I have determined that the IP addresses to which those domain names resolved in April and May 2013 were subscribed to the FEDOREK RESIDENCE.

33. On or about March 6, 2014, the Government obtained a search warrant for the FEDOREK RESIDENCE. On or about March 7, 2014, other agents and I executed the warrant and seized a laptop computer from the bedroom of KYLE FEDOREK, the defendant. That laptop had the username "Kyle" and, according to a relative of FEDOREK, the laptop belonged to FEDOREK. A search of FEDOREK's laptop revealed the following:

a. FEDOREK's laptop contained a copy of the Blackshades RAT. The RAT was configured and operating on FEDOREK's laptop. Among other things, the RAT's "form grabber" feature was configured to search for financial account

information. The files recovered from FEDOREK's laptop revealed that he had deployed the form grabber on at least 400 victims.

b. FEDOREK's laptop contained various other forms of malicious software, including the code for viruses that target banking information (such as Carberp and Citadel); code for "phishing" websites - that is, websites designed to look like legitimate sites for financial entities such as banks and credit card companies but which in fact capture victims' personal identification information; electronic publications on how to hack computers; various tools that can be used to spread malware and to prevent its detection by anti-virus software; and BIN files - that is, files that can reveal what bank issued a particular credit card, thereby enabling its exploitation.

c. FEDOREK's laptop contained at least 9,000 usernames and passwords for others' accounts, including login information for electronic payment processors, banks, email accounts, and social networking sites.

d. FEDOREK's laptop contained a file labeled "CreditCardsHackedByNuclearGroup." The file contained what appear to me to be approximately 50,000 credit card numbers, expiration dates, and security codes known as credit card verification numbers, or "CCVs."

e. FEDOREK's laptop contained files that appear to have been exfiltrated from victims' computers. Among other things, it appears that FEDOREK stole personal photographs that were stored on victims' computers. These photographs were contained in a main folder labeled "downloads," and each victim's photographs were contained in a separate subfolder listing the name of the victim's computer.

f. FEDOREK's laptop contained a folder labeled "work." Within that folder were several subfolders whose labels and contents confirmed FEDOREK's involvement in computer hacking activities including, among others:

i. A folder labeled "Bots + Keyloggers." Within that folder were several programs that operate as keyloggers as well as copies of malicious executable files.

ii. A folder labeled "Andromeda v2.06." Based on my training and experience, I know that Andromeda is a program that can be used to spread malware.

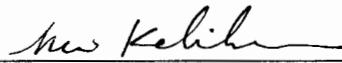
iii. A folder labeled "Citadel." Based on my training and experience, I know that Citadel is a virus that is designed to steal victims' banking information.

iv. A folder labeled "Dos + DDoSers" which contained a DDoS tool.

v. A folder labeled "Havij." Based on my training and experience, I know that Havij is a program that can be used to launch cyber attacks known as SQL injections. The folder contained a copy of the program, among other things.

vi. A folder labeled "PHISH SITES." Based on my training and experience, I know that "phishing" refers to schemes in which users are tricked into clicking on a link and/or divulging their confidential personal information. For instance, a phishing website could be created to look like the legitimate website of a bank. Victims directed to the website are thus tricked into entering their username and password to log in to the site. In truth and in fact, their username and password instead is captured by the operator of the phishing site for later exploitation. The folder on FEDOREK's laptop contained files for phony websites for a bank, a credit card company, and an electronic payments processor.

WHEREFORE, I respectfully request that an arrest warrant be issued for KYLE FEDOREK, a/k/a "kbello," the defendant, and that he be arrested and imprisoned or bailed, as the case may be.



NAVIN KALICHARAN
Special Agent
Federal Bureau of Investigation

Sworn to before me this
15th day of May 2014



HON. DEBRA FREEMAN
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK

Blackshades.NET - Connections 44

EXHIBIT B

F2JLFEDS

Sentence

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

V.

14 CR 548 (VSB)

KYLE FEDOREK,

Defendant.

New York, N.Y.
February 19, 2015
10:10 a.m.

Before:

HON. VERNON S. BRODERICK,

District Judge

APPEARANCES

PREET BHARARA

United States Attorney for the
Southern District of New York

SARAH Y. LAI

Assistant United States Attorney

SERCARZ & RIOPELLE, LLP

Attorneys for Defendant

BY: MAURICE H. SERCARZ

JUTTANA GRAHAM

ALSO PRESENT: NAVIN KALICHARAN, F.B.I.

F2JLFEDS

Sentence

1 (Case called)

2 THE COURT: We're here this morning in the matter of
3 the sentencing of Kyle Fedorek.

4 Mr. Fedorek, if at any point in time you don't
5 understand something that I'm saying, please let me know or let
6 your attorney know. We'll take a break and we'll try and
7 explain it to you, or, if you need a break, just let me know.

8 Okay?

9 THE DEFENDANT: Okay.

10 THE COURT: As an initial matter, I'd like to review
11 with the parties the materials I've received in connection with
12 today's sentencing.

13 So I've read and reviewed the presentence
14 investigation report, which was initially prepared November 12
15 of 2014 and revised January 6 of 2015, including the
16 recommendation and the addendum.

17 I've received the defendant's sentencing submission,
18 dated February 3, that has Exhibits A through V, which includes
19 letters from Mr. Fedorek's immediate family members, relatives,
20 and friends, as well as various letters from physicians and a
21 medical institution concerning Mr. Fedorek's physical and
22 mental health.

23 There's also a letter from Daytop Village accounting
24 with regard to testing that Mr. Fedorek underwent with regard
25 to drug counseling that he's receiving. And the final exhibit

F2JLFEDS

Sentence

1 is an affidavit from Joel Sickler, which is Exhibit V.

2 I'm also in receipt of the government's submission
3 dated February 17, 2015.

4 In addition, I made a request, and, Mr. Sercarz, you
5 should know in connection with the email I sent several days
6 ago, the government provided me with the FBI 302 relating to
7 statements made by Mr. Fedorek on March 7, 2014. And there may
8 be some questions I have with regard to that later on in the
9 proceeding.

10 Just so the parties know, I requested and received a
11 copy of Mr. Fedorek's pretrial service report. I did that in
12 part because I wanted to check -- and we'll talk about this
13 later on. The plea agreement indicated criminal history
14 category I, but because of Mr. Fedorek's prior convictions,
15 he's actually in criminal history category II, which changes
16 the guideline range somewhat from what it was in the plea
17 agreement.

18 Let me just see if there's anything else.

19 Now, have the parties received all the submissions I
20 mentioned? The government.

21 MS. LAI: I have, your Honor. Thank you.

22 MR. SERCARZ: I have, your Honor.

23 THE COURT: Okay, including the 302?

24 MR. SERCARZ: Yes, your Honor.

25 THE COURT: Are there any submissions or documents

F2JLFEDS

Sentence

1 that I don't have, in other words, that the parties intend to
2 submit to me today?

3 MS. LAI: I think it depends on what issues come up,
4 your Honor. We do have some additional material. But if I can
5 offer them at the correct time, if the issue comes up.

6 THE COURT: Absolutely. Obviously, there will be a
7 time period for both counsel to address me with regard to
8 sentencing, as well as the defendant.

9 Mr. Sercarz, have you read the presentence report and
10 discussed it with your client?

11 MR. SERCARZ: I have, and I've discussed it with my
12 client, your Honor.

13 THE COURT: Mr. Fedorek, have you read the presentence
14 report?

15 THE DEFENDANT: Yes.

16 THE COURT: Have you discussed it with your attorney?

17 THE DEFENDANT: Yes.

18 THE COURT: Have you had an opportunity to go over any
19 errors in the report with him or anything else that you feel
20 should be taken up with me with regard to the report?

21 MR. SERCARZ: Yes.

22 THE COURT: Okay. Mr. Sercarz, do you have any
23 objections to the presentence report as it currently stands?

24 MR. SERCARZ: None beyond those that are addressed in
25 the report in various footnotes, your Honor.

F2JLFEDS

Sentence

1 THE COURT: Okay. I'll note that the report was
2 initially issued in November, Mr. Sercarz submitted certain
3 comments to the report, and that the report was modified to
4 take into account those comments.

5 Does the government have any objections to the report?

6 MS. LAI: No, your Honor.

7 THE COURT: Okay. So I will adopt the factual
8 findings in the report. The presentence report will be made
9 part of the record in this matter and placed under seal. If an
10 appeal is taken, counsel on the appeal may have access to the
11 sealed report without further application to the Court.

12 Now, Mr. Fedorek, you may recall back when you pled
13 guilty in October that Judge Gorenstein mentioned a set of
14 rules known as the sentencing guidelines probably several times
15 to you during your guilty plea.

16 The sentencing guidelines are a set of rules that are
17 published for judges by the sentencing commission in order to
18 provide a guide to us. They are not mandatory. They used to
19 be mandatory, which means that courts were required to follow
20 them in almost every instance. However, they're no longer
21 binding. However, I am still required to consider the
22 applicable guidelines as one factor, among others, when
23 determining an appropriate sentence for you. In a sense, the
24 guidelines have become starting point. My first task is to
25 determine what the sentencing guideline range is that you face

F2JLFEDS

Sentence

1 under the guidelines.

2 Now, as I mentioned, the plea agreement I know
3 provides for a sentencing range of 37 to 46 months. Based upon
4 my review of the probation report and Mr. Fedorek's criminal
5 history category, which comes out as a II, I have the guideline
6 range as 41 to 51 months' imprisonment.

7 Do the parties agree that that is the sentencing
8 range, 41 to 51 months? And, again, I understand that for
9 purposes of the plea agreement, both parties are bound by the
10 plea agreement.

11 Well, let me ask it this way. Is there an objection
12 to the calculation of the criminal history category?

13 MR. SERCARZ: None by the defense, your Honor.

14 MS. LAI: Not by the government, your Honor.

15 THE COURT: Thank you. I apologize. I probably
16 phrased that incorrectly because I know you are bound by the
17 plea agreement.

18 So based upon my understanding that defendant's
19 criminal history category is II, I find that the sentencing
20 guideline range is 41 to 51 months, and I accept the guideline
21 calculation in the presentence report. I find that the
22 defendant's offense level is 21 and criminal history category
23 II and that the recommended sentencing guideline, as I
24 mentioned, is 41 to 51 months' imprisonment. The range of
25 supervised release is one to three years, and the fine range is

F2JLFEDS

Sentence

1 7,500 to \$75,000.

2 As I mentioned, I note the plea agreement had criminal
3 history category I and resulted stipulated guideline range of
4 37 to 46 months' imprisonment.

5 Now, I reached the guideline level by starting at a
6 base level offense of six. To that base offense level I
7 increased it by six because the loss amount was more than
8 \$30,000 but less than \$70,000, based upon the defendant's
9 possession of approximately 90 unauthorized access devices.
10 Because the offense involved more than 250 victims, the offense
11 level is again increased by six. The offense level is then
12 increased by two because the offense involved the intent to
13 obtain personal information, including email messages.

14 The offense level is then increased by another four
15 levels because the defendant was convicted of offense under 18
16 U.S.C. 1030(a)(5)(A), making the defendant's adjusted offense
17 level 24. The adjusted offense level is then decreased by a
18 total of three levels for Mr. Fedorek's acceptance of
19 responsibility. The resulting offense level is 21.

20 Now, I understand there is a plea agreement in this
21 case that sets forth the government's position as of the date
22 of the letter with regard to its view of the application of the
23 guidelines due to Mr. Fedorek's conduct. As Magistrate Judge
24 Gorenstein stated at the time of your guilty plea, Mr. Fedorek,
25 the government's letter is not binding on me.

F2JLFEDS

Sentence

With regard to the applicability of any departures, I note that the parties have agreed that neither party will seek an upward or downward departure. However, again, the plea agreement is not binding on me. Therefore, I've independently considered whether there is any other appropriate basis for departure from the advisory range within the guideline system. And while I recognize I have the power and the authority to depart, I do not find any grounds warranting a departure under the guidelines. Although I do not find grounds warranting a departure, I note that I have the power to impose a nonguideline sentence based upon what we call a variance.

Mr. Sercarz, in your letter you suggested that a variance is appropriate in this case. The government, on the other hand, has indicated that it does not believe a variance is appropriate in this case.

Now I'll hear from the parties concerning sentencing.

Does the government wish to be heard on sentencing?

MS. LAI: Beyond -- well, yes. I think the main issue that troubled us was the health issue. But in looking at the letters more closely after submitting the response, it does seem that the last time he actually received treatment for the problem was almost ten years ago. Since then there's been no recurrence that I can see from the medical reports of this issue. And the adjectives used to describe what he had before was mild and nothing life-threatening. So I can't imagine

F2JLFEDS

Sentence

1 that -- that to me does not seem an adequate excuse for a
2 mitigating factor to depart from the stipulated guidelines
3 range.

4 There are some other issues, including whether he made
5 money from the offense, whether he intended to use the devices.
6 Frankly, in response to the Court's question, we do not have a
7 definitive answer as to whether or not those devices were
8 actually used.

9 We do have evidence in the form of a search -- and I'm
10 happy to offer up the photos to the Court -- evidence in his
11 bedroom that he had fairly expensive items, including a 50- to
12 55-inch flat screen TV, a saltwater fish tank that was the
13 length of his bed, not the width, the length, as well as at
14 least one stack of \$100 bills.

15 Now, we cannot say that those properties were
16 purchased with the proceeds of the black shade scheme as
17 opposed to his marijuana dealing scheme. So I offer that for
18 what it's worth. But it does speak to the nature and
19 characteristics of this defendant and whether a guidelines
20 range is necessary to deter future criminal conduct.

21 We also raise the fact in the letter that cybercrime
22 is becoming a very serious problem and a lot of hackers start
23 at a very young age. And I think a message needs to be sent in
24 the form of general deterrence that hacking carries serious
25 offenses and not just a slap on the wrist.

F2JLFEDS

Sentence

1 So those are some of the issues that I think are worth
2 considering. And we have screen shots from the computer which
3 show the file structure, also, of the computer. This is not
4 someone who for fun did it a few times. You can see from the
5 file structure -- and, again, I can hand it up if the Court
6 wants to see it -- that everything is very well-organized in
7 his computer. There is a file called Kyle. There's a file
8 beneath that called work. Beneath that is a list, different
9 folders for different types of malware, including the ones that
10 were mentioned in the government's letter, as well as in the
11 presentence report, the credit card information that was taken,
12 the password information that was taken -- it was all very
13 well-organized within the computer. So it doesn't strike us as
14 indicators of someone who did it for fun and really was not
15 interested in the information that he was gathering.

16 So those are some of the issues we would raise, your
17 Honor.

18 THE COURT: Okay. Now, I heard what you said about
19 the money in his bedroom and the television and the fish tank.
20 I'm correct though that there was no proof or evidence provided
21 in discovery or that the government has that he utilized any of
22 the access devices.

23 MS. LAI: That's correct. I think part of the problem
24 is once -- so, for example, one of the victims, financial
25 victims, that is, was PayPal. There were numerous PayPal user

F2JLFEDS

Sentence

1 names and passwords. They just cannot tell if there's a fraud
2 indicator on a particular account what caused it. So if
3 someone obtains a user name and password, you can basically log
4 in and make purchases with PayPal and PayPal was unable to tell
5 us what caused the fraud, basically. So we can't point to it
6 definitively.

7 THE COURT: Well, definitively -- I'll ask some
8 additional questions a little bit later on. Was there an
9 attempt to, in other words, there are 900 or so access devices
10 and what I'm trying to determine --

11 MS. LAI: Ninety, your Honor.

12 THE COURT: Ninety. Sorry. What I'm trying to
13 determine is if any of them, putting aside PayPal, was there
14 any evidence with regard to any of the other access devices
15 that the victims -- that they were used and that there was an
16 actual financial loss?

17 MS. LAI: Not that we've been able to determine, your
18 Honor.

19 THE COURT: And I guess the other question I have,
20 with regard to the restitution amount, which is \$45,000, based
21 upon the application of \$500 per access device, I haven't dealt
22 with this before. Assuming I order restitution, what happens
23 with that money?

24 MS. LAI: Well, I think we're seeking forfeiture in
25 this case, your Honor, and the forfeiture would be applied to

F2JLFEDS

Sentence

1 restitution if any victim, if the financial institutions are
2 able to determine and provide us with information that suggests
3 that the loss occurred as a result of this crime.

4 THE COURT: Okay. Now, I have the 302 that you
5 provided. And I think I mentioned that in the defense
6 submission, there were comments that Mr. Fedorek made some
7 substantive comments at the time of that call. I guess my
8 question is was there a different call or is this the only call
9 that you're aware of?

10 MS. LAI: That's the only call that we're aware of,
11 your Honor. I think what happened was the defendant was not
12 home at the time of the search. He I think approached home
13 while the search was going on. When he saw law enforcement at
14 his home, he basically left, and then later on his mother
15 called the FBI.

16 THE COURT: Okay. Was there any evidence -- I know
17 that some users of this software utilize it to freeze or lock
18 victim's computers and then request money or something of value
19 in order for the computer to be released. Is there any
20 evidence that that occurred in this case?

21 MS. LAI: No, your Honor.

22 THE COURT: Okay. Now, with regard to other
23 individuals, I noted in the presentence report that there were
24 some other defendants that were actual either workers at black
25 shades or other participants in a larger sense, other

F2JLFEDS

Sentence

1 coconspirators. Do you have a sense what the status is of
2 their cases? I take it they have not been sentenced yet.

3 MS. LAI: No, none of them have been sentenced, your
4 Honor.

5 THE COURT: Okay. Thank you.

6 Mr. Sercarz, I'll hear from you on behalf of your
7 client.

8 MR. SERCARZ: Thank you, your Honor.

9 Your Honor, what I propose to do is to attempt to
10 answer the questions that the Court sent us by email in
11 preparation for this appearance and then to speak to the
12 3553(a) factors, if the Court will allow me to proceed --

13 THE COURT: Sure.

14 MR. SERCARZ: -- in that sequence. And I want to take
15 your questions out of order because I think it will be more
16 helpful to the Court, and I want to talk first about the status
17 of the defendant's New Jersey case.

18 I've been in touch with counsel in Bergen County, and
19 the story as of today is as follows. A plea offer was made to
20 the defendants in the New Jersey case. In fact, let me back
21 off and just give the Court some --

22 THE COURT: Context.

23 MR. SERCARZ: -- factual background.

24 The defendant and a group of other individuals were in
25 a car that was stopped shortly after it left an apartment in

F2JLFEDS

Sentence

1 Edgewater, New Jersey, if I have that right. A search ensued
2 and a quantity of marijuana of over 25 pounds was confiscated
3 as a result of the search. Apparently, there was a
4 confidential informant among those that were in the apartment,
5 and agents of law enforcement were following the car as it left
6 the apartment.

7 A plea offer has been extended to a group of the
8 defendants. The attorney understands it to be a global plea
9 offer, meaning that the offer has been extended to the
10 defendant on condition that everybody in the case accepts it.
11 It calls for a sentence that in the vernacular in New Jersey is
12 called five flat, which means in English that the defendant
13 would be eligible for release after two years if he accepted
14 the sentence.

15 To go on a little bit further, it is the defendant's
16 intent and desire to plead guilty in connection with his
17 participation in the events in New Jersey. And it is my hope
18 that I can fashion a sentence for him that will allow him to do
19 all of his time in custody in a federal facility and never have
20 to endure either incarceration in a Bergen County facility or
21 transportation from a federal jail to Bergen County for the
22 purpose of a court appearance, then to waste away for a while
23 in Bergen County, and then to be transported back to a federal
24 facility with all of the attendant hardship.

25 What we are trying to accomplish with counsel in the

F2JLFEDS

Sentence

1 state courts is the following. The defendant will plead guilty
2 here. I am going to ask for a surrender date which is
3 sufficiently far in the future for the Bergen County prosecutor
4 and the defense attorney in Bergen County to arrive at a
5 disposition and to take the plea. It is my hope that the
6 defendant will have surrendered before the sentencing date in
7 New Jersey and that the judge in New Jersey will consent to a
8 sentence in absentia. And I understand that that is not a
9 far-fetched plan and, indeed, that is what I hope is going to
10 take place.

11 That's my answer to the question about the Jersey
12 case.

13 THE COURT: I just have a few follow-up questions on
14 that issue. Do you have a sense of what the position is of the
15 prosecutor's office in that case as to whether or not the
16 sentence imposed in that case will be concurrent or
17 consecutive?

18 MR. SERCARZ: Our sense is and our hope is that it's
19 going to be a concurrent sentence.

20 THE COURT: And I'll tell you the reason, sort of my
21 motivation. And, again, I haven't heard from all the parties.
22 But if there is a sentence of incarceration here, I believe,
23 and it's borne out in the presentence report, that Mr. Fedorek
24 would benefit from drug treatment. The affidavit that was
25 submitted casts some doubt on whether or not that would be

F2JLFEDS

Sentence

1 possible if there's a detainer lodged against Mr. Fedorek based
2 upon the New Jersey case.

3 And it sounds like you're taking the steps that you
4 need to take to try and ensure that to the extent he's
5 eligible, that he be able to go into a program if he is
6 incarcerated because, again, I think he would benefit from
7 that. And so that's the principal reason why, because although
8 the affidavit identifies issues, that being one of them; the
9 other being the possibility or likelihood that Mr. Fedorek will
10 go, if he's sentenced to incarceration, to a minimum security
11 facility rather than a camp.

12 Do you have a sense, Mr. Sercarz, when the next court
13 date is for that case?

14 MR. SERCARZ: There's a status conference scheduled in
15 Bergen County for all of the defendants on March 4. The
16 defense counsel, who's been very helpful to me and has worked
17 closely with me, has been trying to reach the prosecutor by
18 phone for the past two weeks to find out whether or not Kyle
19 can plead on that date, whether he can plead regardless of what
20 the codefendants do. And she -- her name is, for the record,
21 Lisa Leboeuf -- has been unsuccessful in reaching that
22 prosecutor.

23 So, again, the answer to the question, March 4 is the
24 date for the status conference. Whether or not a plea is going
25 to be taken on that date we just don't know.

F2JLFEDS

Sentence

1 THE COURT: Okay. Thank you.

2 MR. SERCARZ: Your Honor, the answers to the other
3 questions that I'm in a position to answer, question No. 1, the
4 defendant's conversation with an FBI agent on the day his
5 family's home was searched, you now have an FBI 302
6 demonstrating that the defendant's mother, with the defendant
7 present, got on the phone and indicated a willingness to speak
8 to agents of law enforcement.

9 I can also tell the Court that within two weeks the
10 defendant was in the offices of the FBI accompanied by counsel,
11 made a full proffer on March 24 of 2014, which is summarized in
12 an FBI 302 report. The government provided us with that report
13 in discovery. I have it and it indicates exactly what the
14 defendant has been saying from the day that he got arrested: I
15 hacked. I am sorry for what I did. I never took the sensitive
16 personal financial information of my victims and, to use the
17 Court's word, attempted to "monetize" the information for the
18 purpose of stealing money from my victims.

19 When the defendant pled guilty in this court, in his
20 plea allocution he said exactly the same thing. The government
21 has been on notice of our position in this case from the very
22 beginning. The defendant has been open, honest, and
23 comprehensive in the information that he has provided to the
24 government. And, indeed, I don't think it's presumptuous to
25 say if there was a Fatico hearing on the issue of whether or

F2JLFEDS

Sentence

1 not the defendant monetized the information, the Court would be
2 constrained to make a finding based on all the defendant's
3 statements and the lack of any evidence coming from the
4 government that it is a fact that the defendant did not
5 monetize the financial information that came from others.

6 THE COURT: Mr. Sercarz, as I understand the
7 defendant's statements, although with regard to the access
8 devices there wasn't that effort, but my understanding was that
9 at least part of the intent was to get bitcoin.

10 MR. SERCARZ: That's right.

11 THE COURT: I understand it may not have been was --
12 it didn't reap the benefits that the defendant had thought it
13 would, but that that was one of the motivations.

14 MR. SERCARZ: That's right. It's not only that he was
15 unsuccessful. It is not that he was unsuccessful in extracting
16 money from people's accounts. And here we have a generational
17 problem because I am not as computer facile as Ms. Graham, the
18 agent, and others. But my understanding is when you
19 quote/unquote mine for bitcoin, you're not taking credit card
20 information, bank account information, and converting that into
21 money and putting it into your pocket, that you mine bitcoin by
22 using the power in other people's computers to go through a
23 series of hoops which somehow, if you navigate them
24 successfully, will give you credit in an online exchange that
25 allows you to convert this credit into bitcoin or, indeed, into

F2JLFEDS

Sentence

1 dollars.

2 The defendant was fascinated with the process. He
3 harbored the desire to day trade using this bitcoin or to
4 invest in an online casino in which bitcoin would be used as
5 the currency at the casino.

6 I'm not suggesting that the defendant was entirely
7 without a financial motive. I guess in some ways I'm splitting
8 hairs here, but I am suggesting that he never intended to take
9 the financial information that he obtained from victims and to
10 use it so that the victims would be placed in an out-of-pocket
11 situation and he would reap the benefits of their credit card,
12 bank account, and the like, which is a distinction of some
13 importance when the Court considers harm to victims and the
14 like. And the defendant has been up-front about this from the
15 day of his arrest.

16 Juliana, if you were closer to me, would you be
17 kicking me under the table? Did I get this more or less right?
18 So that's the answer to that question.

19 You asked, your Honor, about the status of genetic
20 family testing. You've heard about the problem that the
21 defendant experienced when he was 16 years old, the fact that
22 his brother, who is present in court, has been diagnosed with
23 the same problem, and you've asked whether there's been any
24 follow-up. When the defendant's blood was taken, he was told
25 that no result would be available for at least six months and

F2JLFEDS

Sentence

1 perhaps as long as two years. Whether there is going to be any
2 follow-up, whether there's going to be any need to extract
3 further blood, saliva, or skin from the defendant, I'd be
4 speculating --

5 THE COURT: Okay.

6 MR. SERCARZ: -- as to that. I would note, among
7 other things, if we knew that it was needed, I would be here
8 arguing that that's an extraordinary family circumstance and
9 that his presence in order to provide those materials was
10 necessary to the welfare of his brother, who's suffering from a
11 very serious illness. I leave that for the Court, but I am not
12 going to exaggerate. It would be speculative to assume that
13 the defendant is going to be called upon to provide any further
14 material for that study.

15 I'm ready to talk about 3553(a) if the Court is ready
16 to hear me.

17 THE COURT: Let me just see if I have any additional
18 questions before you move to that.

19 I noted that the last indication from Daytop Village
20 was January 19, 2015. Has Mr. Fedorek had any testing since
21 that time?

22 THE DEFENDANT: Yeah.

23 THE COURT: Let me ask, I assume since I haven't been
24 notified that he tested positive and that there's a violation.
25 Is the government aware whether or not there have been any

F2JLFEDS

Sentence

1 positive tests in connection with Daytop Village?

2 MS. LAI: We've received no indication of such from
3 pretrial services, your Honor.

4 THE COURT: All right. And I take it, Mr. Sercarz,
5 you haven't either.

6 MR. SERCARZ: That's correct, your Honor.

7 THE COURT: Okay.

8 MR. SERCARZ: Thank you, your Honor.

9 Your Honor, the Court should know at the outset that
10 present in the court are the defendant's mother, Bonnie
11 Fedorek, his father. His brother is seated all the way on the
12 right. And the defendant's aunt, Mr. Fedorek's sister, are all
13 present in court to lend their support on his behalf. This is
14 a family that has been unified by the events that's taken place
15 and are all lock solid in their support for Kyle.

16 The statute requires that the sentence imposed be, and
17 I quote, sufficient but not greater than necessary to meet the
18 goals of sentencing set forth in 18 U.S. Code Section 3553(a),
19 which calls for the Court to consider in this context the
20 nature and circumstances of the offense. Among them I would
21 urge the Court to consider that at the time the defendant
22 engaged in the offense, he was suffering from a major
23 depressive disorder and this is documented.

24 And right there I would note parenthetically, the
25 government has focused on the illness and the absence of a

F2JLFEDS

Sentence

1 recurrence, but the government has overlooked the psychological
2 impact of what happened to my client at the age of 16, his near
3 brushes with death, and the documented impact that that caused
4 on him, the major depressive disorder that resulted from these
5 horrible episodes that befell him.

6 And I went through it in the submission. So many
7 times Bonnie Fedorek attempted to rein Kyle in only to be
8 confronted with the response, what's the difference, I'm going
9 to die young anyway. He made some horrible self-destructive
10 choices, but there was a reason why and, as I'm going to
11 discuss, he's taken steps to address these choices.

12 At the time he committed this offense and the offense
13 in New Jersey, he was suffering from substance abuse,
14 polysubstance abuse -- the abuse of marijuana, the abuse of
15 alcohol, and his use of other drugs. He had an unhealthy
16 fascination with the internet, with malware, with bitcoin, with
17 internet casinos, that led him to engage in this behavior. We
18 submit, and there's no proof to the contrary, that there was no
19 effort to monetize sensitive victim financial information.

20 Now, with regard to this notion of multiple
21 overlapping enhancements -- and I have urged the Court to
22 address this by looking carefully at the other 3553(a)
23 factors -- the government in its submission suggests that there
24 are no multiple overlapping enhancements, and I respectfully
25 beg to differ, your Honor. If you hacked into someone's

F2JLFEDS

Sentence

1 computer, you are not in control of the information that's
2 provided to you in response. There are enhancements for both
3 the loss and the number of victims. When the defendant
4 obtained access device material from more than 90 victims,
5 almost by definition you're going to apply a \$500 minimum loss
6 to each one as a presumption. The loss amount is also going to
7 climb.

8 This was a computer-related crime, and if you use the
9 computer to hack into the computers of others, you are almost
10 as an inevitable result going to obtain personal information;
11 and yet enhancements are given both for personal information
12 and for computer-related crime. And if you hacked, it is
13 almost an inevitable result that you're going to receive all
14 four enhancements.

15 I'm constrained by the plea agreement to acknowledge
16 that all of these enhancements apply. But when I said in my
17 sentencing submission that what happens in a case like Kyle's
18 is that the guidelines become a very poor gauge -- my words --
19 for evaluating his conduct, I meant it and I stand by it.

20 The other 3553(a) factors indicate that there is a
21 need for the sentence imposed to reflect the seriousness of the
22 offense and to provide just punishment, and here we have
23 Exhibit V to my submission, the affidavit of Joel Sickler. It
24 is our best understanding that as a result of this detainer,
25 the defendant will not be eligible for the residential drug and

F2JLFEDS

Sentence

1 alcohol program, which is the best method and, indeed, to my
2 knowledge, the only method by which the defendant's substance
3 abuse problems would be addressed while he is in a federal
4 jail. That's No. 1.

5 Now, No. 2, this is a 27-year-old man who has never
6 had the experience of having to spend any time in jail. He is
7 now going to be locked up not in a camp but behind the walls,
8 not with other camp-eligible incarcerated defendants, but with
9 people from a greater spectrum of the criminal justice system.
10 He's going to be there not only with no opportunity for
11 meaningful treatment, but the very treatment that has proven
12 successful thus far is going to be taken away from him. He's
13 going to be in there cold turkey, on his own. This is going to
14 be hard time for this defendant. And anybody in the general
15 public who understood what it is that Kyle is going to have to
16 endure for the next two years or more wouldn't describe this as
17 a slap on the wrist. This is going to be hard punishment for a
18 serious crime, your Honor.

19 The Court must consider whether or not the sentence
20 imposed will provide adequate deterrence for the defendant's
21 conduct, and Bonnie Fedorek put it much more eloquently than I
22 could when she said that the arrest in Bergen County and the
23 arrest here in the Southern District of New York stopped the
24 runaway train that was her son's life. Indeed, his remorse
25 before he came to court to be sentenced is the best guarantee

F2JLFEDS

Sentence

1 that we can give this Court that whatever term of incarceration
2 he receives is going to provide adequate deterrence and that
3 this Court need not be concerned that the defendant is going to
4 go back out on the street when he's released and commit crimes
5 other than this.

6 And if some kind of more objective evidence was
7 required, then I commend to the Court the report from Daytop
8 indicating his successful completion of the program and all of
9 those pretrial services reports that demonstrate time after
10 time after time negative urine samples.

11 Your Honor, all of these factors weigh in favor, I
12 respectfully submit, of a shorter term of incarceration, the
13 difficult term of incarceration that lies in store for Kyle,
14 and then a maximum term of supervised release with requirements
15 for drug treatment. I would urge the Court that if we have a
16 genuine interest in making sure that the defendant is drug
17 free, that he receives the education that he needs and the
18 support that he needs to maintain a sober life and a productive
19 life, the best way to do it is to get him out as soon as
20 possible and to get him back into drug treatment. And it's for
21 that reason that I recommended to the Court with the Jersey
22 sentence in mind a period of incarceration of 24 months.

23 In conclusion, your Honor, notwithstanding that Kyle
24 is 27 years old, I note that he was still living at home at the
25 time of the offense and he's in many ways a very young man and

F2JLFEDS

Sentence

1 a very unformed young man. I truly believe his family is here
2 to tell you that he has reached a turning point in his life.
3 He is young enough to change. He has the desire to change. He
4 is capable of changing.

5 And I urge the Court to impose a sentence with the
6 minimum amount of jail time the Court can see fit to impose,
7 bearing in mind the requirement that it be sufficient but not
8 greater than necessary and supervised release that will give
9 Kyle the drug treatment and treatment for his depression that
10 he needs. Thank you.

11 THE COURT: Sure. Mr. Sercarz, let me ask just this
12 question with regard to the affidavit submitted from
13 Mr. Sickler and I just want to make sure I'm reading this
14 correctly that if you're successful and Mr. Fedorek's New
15 Jersey attorney are successful in -- and, again, assuming that
16 there's a period of incarceration -- successful in getting him
17 pled and sentenced to concurrent time and that time is not in
18 excess of the time that I sentence him to, is it your
19 understanding that a detainer will be placed?

20 MR. SERCARZ: A detainer is going to be placed from
21 the time that there is a judgment in Bergen County, which will
22 be present when the defendant goes in, and it will be lifted
23 shortly after the defendant fulfills his sentence, assuming
24 that it's a sentence to concurrent time, and assuming for the
25 moment that it's the kind of two-year sentence that's

F2JLFEDS

Sentence

1 anticipated by counsel in New Jersey.

2 THE COURT: Okay. I don't know whether there's a
3 possibility of transferring jurisdiction from New Jersey to the
4 federal system for purposes of eliminating the detainer
5 possibility because I do think, as I mentioned, that the
6 defendant would benefit from a drug treatment program which, as
7 I understand it from Mr. Sickler's affidavit, he wouldn't be
8 eligible for as long as there's a detainer outstanding.
9 Regardless of where he may be housed, he wouldn't be eligible.
10 And I have no idea whether New Jersey, what that means or what
11 would have to occur.

12 MR. SERCARZ: That's right. You know, in considering
13 the difference between the guidelines, your Honor, and the
14 sentence that I'm proposing, this may help the Court. If the
15 defendant received a sentence of 44 or 45 months' imprisonment
16 and were eligible for the residential drug and alcohol program,
17 he could complete the portion of the program that an inmate
18 completes while incarcerated and be eligible for the first
19 stages of release after two years, and that's customarily the
20 way it works.

21 THE COURT: Because of the reduction, that happens
22 when you participate and are successful.

23 MR. SERCARZ: Yes. And the remainder of the sentence
24 would be served under progressively less restrictive conditions
25 of confinement, halfway house, and then ultimately supervised

F2JLFEDS

Sentence

1 release. If he were eligible for that program, I could be in
2 here saying, your Honor, give him a guideline sentence and I'd
3 have some comfort he would be out after two years. But
4 Mr. Sickler found out that the designation people in Texas --
5 and this is right in his affidavit -- they will not allow a
6 defendant who has a detainer from another jurisdiction to
7 participate in that program.

8 THE COURT: Okay. All right. Thank you.

9 Mr. Fedorek, would you like to be heard on your own
10 behalf?

11 THE DEFENDANT: Yes. First I would like to apologize
12 to the Court and the agents who worked on my case. I would
13 also like to apologize to all the victims, those who realized
14 that their computers were compromised and those who did not. I
15 am fully aware now the damage that my computer hacking has
16 caused to the victims. This whole situation has been a real
17 eye opener and a life-altering event for me. I look back and I
18 am upset with myself for using my knowledge and computer
19 expertise to do harm instead of using it for a good and lawful
20 purpose.

21 I cannot change what has been done, and I can only say
22 that I am learning from my mistakes. I look forward to
23 continuing my education by pursuing my master's degree and
24 having a productive career once I get past this hard point in
25 my life. The most important reform that I have made is that I

F2JLFEDS

Sentence

1 started down the road of living a sober life. I have struggled
2 with drug and alcohol dependency for more than ten years.

3 Since my arrest, I have learned to exercise caution
4 and to think more carefully about all of my actions and the
5 repercussions of my actions. I've also learned to avoid going
6 out as much as I used to and putting myself into other
7 dangerous situations and more aware of who I'm hanging out
8 with. I look forward to living a sober life and having a
9 brighter future.

10 Finally, I'd like to thank my parents, my brother, my
11 family, and my friends for the love and the support that they
12 have given me throughout this difficult time. I only hope to
13 be able to repay the trust and confidence that they have shown
14 in me.

15 THE COURT: Okay. Thank you.

16 Does either counsel know of any reason why sentence
17 should not be imposed at this time?

18 MS. LAI: No, your Honor.

19 MR. SERCARZ: No, your Honor.

20 THE COURT: Okay. As I have stated and as the parties
21 acknowledge, in light of the criminal history category, the
22 defendant's sentencing range is 41 to 51 months.

23 Now, before I get started, I would like to comment on
24 one thing, Mr. Sercarz. You mentioned that the family was
25 brought closer together in part because of what has happened to

F2JLFEDS

Sentence

1 Mr. Fedorek. But I would say that based upon what I've read
2 that they were close before that and hopefully will remain so
3 because I think he's going to need their support.

4 Okay. So under the Supreme Court's decision in Booker
5 and its progeny, the guideline range is only one factor that I
6 must consider in deciding an appropriate sentence. I'm also
7 required to consider other factors set forth in 18 U.S.C.
8 3553(a) and I have done so. Those factors include, but are not
9 limited to, the nature and circumstances of the offense and the
10 personal history and characteristics of the defendant, as each
11 defendant must be considered individually as a person. Judges
12 are required to consider the need for the sentence imposed, to
13 reflect the seriousness of the offense, promote respect for the
14 law, provide just punishment for the offense, afford adequate
15 deterrence to criminal conduct, and to avoid unwarranted
16 sentencing disparities, among other things.

17 First I'm going to address Mr. Fedorek's history and
18 characteristics. I note that it is clear from the letters
19 submitted by Mr. Fedorek's immediate family, other relatives,
20 and friends that he has people who believe he is a caring and
21 loving person and that they support and love him despite his
22 battle with alcohol abuse and possible other addictions, his
23 guilty plea in this case, his other criminal convictions, and
24 his pending criminal case in New Jersey. Therefore, I credit
25 the descriptions in their letters of their perceptions of him

F2JLFEDS

Sentence

1 as indicative of his character and I will give these
2 considerations under 3553(a).

3 However, I note the defense submission and many of the
4 letters submitted on Mr. Fedorek's behalf reference, and I
5 quote, that family has always been of the utmost importance to
6 him. While I have no reason to doubt the statements made in
7 the letters and that as a general proposition that that is
8 correct, I do believe that the fact Mr. Fedorek committed the
9 underlying offense in his family's home, that resulted in the
10 family's home being searched, an event that had to have been
11 traumatic, I imagine, for the family members who were present
12 at that time, demonstrated a lack of at a minimum maturity and
13 astounding bad judgment. That I also must consider.

14 I guess what I'm saying is, in other words, if family
15 was at the forefront of his mind, I would expect at a minimum
16 him to avoid criminal conduct or I should say to avoid criminal
17 conduct and at a minimum to not do it in his family's home,
18 putting them in harm's way.

19 I also indicated that I don't believe that a downward
20 departure is warranted in this case. Having said that, I do
21 believe that Mr. Fedorek's health issues that began when he was
22 age 16, combined with the apparent impact those issues had on
23 him, warrant consideration as part of his sentence. And by
24 that I mean independently, under the sentencing guidelines, I
25 don't believe that his health would warrant necessarily a

F2JLFEDS

Sentence

1 departure. But when considered in combination with the impact,
2 as Mr. Sercarz pointed out, that it had on him -- and I don't
3 know what the future holds with regard to his health. But it
4 did appear from the letters that were submitted that it did
5 have a psychological impact on him, whether that was real --
6 and by real I mean whether his feeling that he wasn't going to
7 live was real or not, it was real to him. Therefore, I credit
8 the observations of his immediate family who commented how the
9 defendant appeared to change after his hospitalization.

10 And I would note that although there hasn't been a
11 recurrence in the recent past, that the initial onset resulted
12 in Mr. Fedorek collapsing, resulted in Mr. Fedorek being
13 hospitalized I think for multiple weeks, resulted in both of
14 his lungs collapsing over the course of that treatment, and so
15 it was a serious onset. What the future holds, I don't know
16 and I can't predict.

17 Now, I believe that his fatalistic attitude, increase
18 in drinking, experimenting with drugs, and his unwillingness to
19 listen to adults, including his parents, were at least in part
20 tied to his illness and the uncertainty that he perceived he
21 was living under. Although this reaction could have been the
22 product of his age, 16 at the time that he became ill, and a
23 consequent lack of maturity, the defendant didn't grow out of
24 this phase in his life and, in many ways, was unable to move
25 forward with his life to become an adult, not only with regard

F2JLFEDS

Sentence

1 to age but in his deeds. In fact, the defendant's conduct
2 seemed to get worse until it progressed into criminal acts.

3 I would note that with regard to the defendant's prior
4 two convictions that he's incredibly fortunate that someone
5 wasn't injured when he was drinking or under the influence
6 because we wouldn't even be here today. He would be in a much
7 worse position.

8 Now, next I'll turn to the nature and circumstances of
9 the offense. There is no question that Mr. Fedorek pled guilty
10 to a serious offense. He purchased and used the black shade
11 software to infect hundreds of computers belonging to hundreds
12 of victims and stole, among other things, user names and
13 passwords, financial information, as well as personal items
14 such as photographs. The FBI also gathered evidence that the
15 defendant purchased and/or downloaded other malware on his
16 computer, although I recognize there's no evidence that he
17 utilized that software.

18 In the defense submission it's pointed out that it was
19 never Mr. Fedorek's intention to hurt anyone. Well, it's a
20 very difficult position to be in. I can't look into his heart
21 to determine what his actual intent was. I can only look at
22 what the evidence is that's been presented to me. And I note
23 that with regard to whether or not actual losses were found,
24 with the exception of bitcoin, there is no evidence that there
25 was actual losses.

F2JLFEDS

Sentence

1 But I would say this with regard to the intention,
2 that he didn't have an intention to hurt anybody. And this,
3 again, may just be a product of immaturity or not a complete
4 understanding of exactly what this crime entailed. There's
5 still no escaping that the defendant stole and invaded the
6 privacy of his victims. In many ways, computers have replaced
7 photo albums, phone directories, and diaries; and we use them
8 on a daily basis to store critical financial information. So,
9 in many ways, it was as if the defendant literally entered the
10 homes of these victims and stole their valuables. There's,
11 again, and Mr. Fedorek acknowledged this in his comments, for
12 the victims who are aware that their privacy was invaded, it
13 will take a long time for them to recover from that because,
14 again, it's as if someone was rummaging through their home.

15 Therefore, in order to demonstrate the seriousness of
16 the offense, promote respect for the laws related to computer
17 hacking, provide just punishment for the offense, afford
18 adequate specific and general deterrence to criminal conduct,
19 such as been committed here by the defendant, I do believe that
20 Mr. Fedorek's conduct does warrant a period of meaningful
21 incarceration even when tempered against his history and
22 characteristics.

23 However, I believe that certain aspects of the
24 guideline calculation overstates the seriousness of the offense
25 in light of the defendant's conduct and in light of his

F2JLFEDS

Sentence

1 history.

2 I recognize and I have accepted the guideline
3 calculation of loss in the PSR applying \$500 per device, the
4 rule contained in application note (3) (f) (i). This multiplier
5 is used whether or not a device was used and/or whether or not
6 it resulted in a loss. This is consistent with the Second
7 Circuit's holding in *United States v. Dodson*, as well as the
8 holding in other circuits, specifically the Sixth Circuit in
9 *United States v. Gilmore* and in *United States v. Lyles*.

10 Here, as I understand it, there is no evidence that
11 Mr. Fedorek used any device and there's no evidence that there
12 was an actual financial loss by any of the victims attributable
13 to his conduct. Under the facts of this case, I believe that
14 the six-level loss enhancement would be an overstatement or
15 overly harsh and, therefore, it warrants consideration under
16 3553(a).

17 I also note that unlike the defendant in *Dodson* who
18 knowingly possessed a list of stolen credit cards and actually
19 sold some of those credit card numbers to a cooperating witness
20 with the knowledge that those were going to be used without
21 authorization, I also note that unlike the defendant in *Dodson*,
22 Mr. Fedorek does not have a long history of committing identity
23 fraud.

24 Now, to be clear, I'm not saying that the application
25 of application note (3) (f) (i) would warrant a variance in every

F2JLFEDS

Sentence

1 case. Rather, given Mr. Fedorek's history and characteristics
2 and the facts and circumstances of his conduct in this case, I
3 believe that a variance is warranted with regard to this
4 particular guideline application. As the Sixth Circuit noted
5 in *Lyles*, "The harshness of the 500 per case device rule will
6 certainly justify a downward variance in the eyes of some
7 judges, but that is an individualized determination to be made
8 by the sentencing court."

9 I note that the defendant has the support of his
10 family and friends and, as I've indicated, I believe that they
11 will continue to support him. I hope that this will help
12 Mr. Fedorek comply with the law in the future. Therefore, with
13 regard to specific deterrence, it's less of a factor for me in
14 this case because of that fact.

15 Now I'm ready to impose sentence. Mr. Fedorek, please
16 rise for the imposition of sentence.

17 It is the judgment of this Court that you be committed
18 to the custody of the Bureau of Prisons for the period of 24
19 months.

20 That period of incarceration will be followed by three
21 years of supervised release.

22 There is also -- and, again, I'm not sure exactly how
23 this will work -- but there's also the issue of restitution in
24 the amount of \$45,000 and I will order that restitution.

25 In addition, the defendant must pay a \$100 special

F2JLFEDS

Sentence

1 assessment, which is due immediately.

2 Now, I'm not going to impose a fine because at this
3 stage I know the defendant is unable to pay a fine and I think
4 it's more important, again, to the extent that restitution be
5 made.

6 I believe that the sentence is sufficient but not
7 greater than necessary to comply with the purposes of
8 sentencing set forth in 18 U.S.C. 3553(a)(2).

9 Now, with regard to supervised release, the defendant
10 will be subject to the mandatory conditions set forth on
11 page 26 of the presentence report, the standard conditions one
12 through 13, and the special conditions described in the
13 presentence report on pages 27 through 28.

14 Now, does any counsel know of any legal reason why
15 this sentence should not be imposed as stated?

16 MR. SERCARZ: No, your Honor. I have an application
17 with regard to the sentence once it is imposed.

18 THE COURT: Okay. Does the government have any legal
19 reason why the sentence should not be imposed?

20 MS. LAI: No, your Honor.

21 THE COURT: Okay. The sentence as stated is imposed.

22 Mr. Sercarz, you have an application.

23 MR. SERCARZ: Yes, your Honor. I'm going to request
24 that the Court give the defendant a date for voluntary
25 surrender which is sufficiently far out for us to try and

F2JLFEDS

Sentence

1 accomplish in the County of Bergen the events that we
2 described. I would ask the Court for a surrender date two
3 months out. And we would also request that the Court recommend
4 that the defendant be housed in the Federal Correctional
5 Institution in Danbury, Connecticut, which is the nearest low
6 security facility, and would therefore permit maximum
7 visitation by members of the defendant's family.

8 THE COURT: Okay. Does the government want to be
9 heard on either of those applications, that was the 60-day
10 surrender period and the recommendation for Danbury,
11 Connecticut?

12 MS. LAI: We have no objection to the surrender
13 period. We take no position on where he should be
14 incarcerated.

15 THE COURT: All right. So I will set -- and I'll
16 provide you with a specific date in a moment -- surrender date
17 of 60 days. And I will recommend to the Bureau of Prisons,
18 again, it is a recommendation, that Mr. Fedorek serve his
19 sentence in Danbury, Connecticut, in that facility.

20 Ms. Williams, if we could have a date 60 days out.

21 THE DEPUTY CLERK: April 20.

22 THE COURT: So April 20 will be the surrender date.

23 Now, let me say this with regard to that.

24 Mr. Sercarz, I expect that you and the New Jersey counsel will
25 do your utmost to make sure it happens in the next 60 days. If

F2JLFEDS

Sentence

1 for some reason it doesn't, I'd like to hear from you to make a
2 determination about whether or not I believe there's good cause
3 to extend the time period to allow that to happen, in other
4 words, but I expect you to take care of that as best you can.

5 MR. SERCARZ: You got my word, your Honor.

6 THE COURT: Okay. Now let me just say this. That's
7 my sentence, Mr. Fedorek, and you may be seated. You have a
8 right to appeal your conviction and sentence. The notice of
9 appeal must be filed within 14 days of the judgment of
10 conviction. If you're not able to pay the cost of an actual
11 appeal, you may apply for leave to appeal in forma pauperis.
12 If you request, the clerk of the court will prepare and file an
13 appeal on your behalf.

14 Now, Mr. Fedorek, I expect that when you are in prison
15 that you're going to meet other inmates who are not nearly as
16 fortunate as you are. There are going to be young men who
17 don't have families who are supporting them. I hope that you
18 view this as an opportunity to see if you can help others,
19 obviously, and make the best time you can in jail, whether or
20 not you're able to participate in a drug treatment program.

21 Now, I hope that when you're released from custody,
22 you'll be a law-abiding citizen, and I guess what I mean by
23 that, I sentenced you to three years' supervised release for a
24 reason. I will be, not directly, but the probation department
25 will be watching you, and I don't want to see you again. And

F2JLFEDS

Sentence

1 you don't want to see me again because I will tell you I've
2 given you a break today. And but for the advocacy of your
3 attorney, you'd be spending more time in jail, and the support
4 of your family in the letters and things that they submitted,
5 you know, you would be spending more time in jail.

6 So what I'm saying to you, if you do come back before
7 me, I'll just say this, you don't want to come back before me
8 because I'm not going to give you another break.

9 Now, with regard to the forfeiture, I understand, I
10 don't have a forfeiture order, but I understand that
11 Mr. Fedorek agreed to forfeit the computers that were utilized
12 in connection with the offense. And I'm not sure what other
13 materials there were. I'm just looking at the plea agreement
14 now.

15 MS. LAI: Your Honor, the government will submit a
16 forfeiture order within 24 hours.

17 THE COURT: Fantastic. Are there any other
18 applications?

19 MR. SERCARZ: One, your Honor. The Court is aware
20 that we have provided a version of our presentence submission
21 with certain proposed redactions relating to sensitive personal
22 information, addresses of those who wrote letters, information
23 regarding the defendant's medical conditions. We have spoken
24 to the government and understand that the government has no
25 objection to our proposed redactions, and I would ask the Court

F2JLFEDS

Sentence

1 to order that we have permission to redact the submission as
2 indicated.

3 THE COURT: I have reviewed both the redacted and,
4 obviously, the unredacted version. I think it's appropriate.
5 You can submit the redacted version for filing on ECF and an
6 unredacted version for filing under seal.

7 MR. SERCARZ: Yes, your Honor.

8 THE COURT: As I understand it, the defendant pled
9 guilty to an information and that there are no outstanding
10 counts.

11 MS. LAI: That's correct, your Honor.

12 THE COURT: Okay. Is there anything further from the
13 government?

14 MS. LAI: No not from the government, your Honor.

15 THE COURT: From the defense?

16 MR. SERCARZ: No. Thank you, your Honor.

17 THE COURT: We'll stand adjourned. Thank you.

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EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA
:
- v. - 14 Cr. 548 (VSB)
:
KYLE FEDOREK,
a/k/a "kbello,"
a/k/a "kbella,"
:
Defendant.
:
----- x

GOVERNMENT'S SENTENCING MEMORANDUM

PREET BHARARA
United States Attorney for the
Southern District of New York,
Attorney for the United States of America.

SARAH Y. LAI / DANIEL S. NOBLE
Assistant United States Attorneys
- *Of Counsel* -



United States Attorney
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The Silvio J. Mollo Building
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New York, New York 10007

February 17, 2015

BY ECF AND EMAIL

Hon. Vernon S. Broderick
United States District Judge
Southern District of New York
40 Foley Square
New York, NY 10007

**Re: *United States v. Kyle Fedorek*
14 Cr. 548 (VSB)**

Dear Judge Broderick,

Sentencing in the above-referenced matter is scheduled for February 19, 2015, at 10:00 a.m. The Government respectfully submits this letter in advance of sentencing for the Court's consideration.

The United States Probation Office has calculated a United States Sentencing Guidelines ("Guidelines" or "U.S.S.G.") range of 41 to 51 months' imprisonment, as set forth in their Presentence Investigation Report ("PSR"). The Government respectfully submits that a sentence within that Guidelines range is sufficient, but not more than necessary, to provide just punishment, promote respect for the law, and provide deterrence for a serious offense that involved infecting over 400 victims' computers with malicious software, or malware, known as the Blackshades Remote Access Tool ("RAT"). Defendant Kyle Fedorek ("Fedorek" or the "defendant") used the RAT primarily to steal victims' usernames and passwords for various financial, email and social networking accounts.

As discussed in the PSR, Fedorek was a customer of the Blackshades organization. He purchased the Blackshades RAT in or about September 12, 2012. (PSR ¶ 34(a)). Based on an analysis of Fedorek's laptop computer, which was seized pursuant to a search warrant at the time of his arrest, the last time that he downloaded stolen data from any victim's computer was in November 2013. The feature of the RAT that Fedorek used the most was a feature known as "form grabber." This feature was configured to search for financial account information, deployed on over 400 victim computers (PSR ¶ 36(a)), and used successfully to steal financial account log-in credentials from approximately 90 of those computers. In addition, Fedorek used the RAT to steal usernames and passwords for victims' email and social media accounts. The Government has not been able to determine from the analysis of the laptop whether Fedorek used the stolen log-in credentials. While some of the accounts associated with the stolen usernames

and passwords had experienced fraud, the financial institutions where the accounts were held were unable definitively to attribute the fraud to any particular malware.

The analysis of Fedorek's laptop showed that in addition to data stolen using the Blackshades RAT, he also possessed data stolen through other means and other types of malware. Although not part of the charged offense, Fedorek's possession of other malware is relevant to the nature and characteristics of the defendant. For example, Fedorek's laptop stored a database of 50,000 credit card numbers with corresponding expiration dates and security codes. (PSR ¶ 36(d)). The file name of this database suggested that the credit card information was stolen by a hacking group.

In addition, Fedorek's laptop also contained other malware, including, among others:

- at least two other types of keyloggers, besides the Blackshades keylogger;
- executable files for at least two known banking Trojans, *i.e.*, malware designed to steal bank account log-in credentials;
- a program which sends spam to instant messaging services such as ICQ and AOL Instant Messenger;
- an executable file for malware used to launch Distributed Denial of Service (“DDoS”) attacks;
- two cryptors, *i.e.*, malware which is used to obfuscate viruses to prevent their elimination by antivirus software;
- four penetration testing tools which are designed to find and exploit security vulnerabilities on webpages, a common method of compromising websites;
- files for creating counterfeit websites for American Express, Bank of America and PayPal; such fake websites are often used by cyber criminals to deceive victims into divulging their account access and personal identification information; and
- proxy programs, which are software programs that obfuscates the user's true Internet Protocol address, and hence, physical location.

(PSR ¶ 36).

The information stored in Fedorek's laptop was extensive and carefully organized. The level of organization, together with the variety of malware stored on Fedorek's computer, suggests that he was a resourceful and determined hacker. While the Government is sympathetic to Fedorek's medical condition, it cannot excuse his criminal conduct.

The defendant contends that a sentence within the Stipulated Guidelines Range of 41 to 51 months would overstate the seriousness of the offense because the Guidelines for computer

hacking “are a poor gauge for evaluating behavior such as that exhibited by Mr. Fedorek in this case.” (Def. Ltr at 11). The Government disagrees. The enhancement based on the loss amount – calculated by multiplying the number of stolen access devices (here, usernames and corresponding passwords are counted as one device) by \$500 per access device, *see U.S.S.G. § 2B1.1 comment n. 3(F)(i)* (loss “shall be not less than \$500 per access device”) – is actually a *conservative* estimate. As discussed above, the defendant possessed some fifty *thousand* credit card numbers together with their expiration dates and security codes. However, because it is unclear how and when Fedorek obtained that database, we did not include that database as relevant conduct to which the \$500 per access device formula would otherwise apply.

The other enhancements in the Guidelines calculation do not substantially overlap with each other or with the enhancement based on the loss amount. Each enhancement focuses on an aspect of the defendant’s conduct that is not necessarily present in every computer hacking scheme. Thus, it is because Fedorek used the Blackshades RAT to steal usernames and passwords for both email accounts as well as financial accounts that he received the additional enhancement for stealing personal information under U.S.S.G. § 2B1.1(b)(17). Similarly, it is because he indiscriminately infected the computers of over 400 victims that he received the enhancement under U.S.S.G. § 2B1.1(b)(2)(C). And because Fedorek intended to, and did, undermine the integrity of his victims’ computers, the four-level enhancement under U.S.S.G. § 2B1.1(b)(18)(A)(ii) must be applied. Each of these enhancements reflects specific harm caused by the defendant’s offense conduct.

In addition to the seriousness of the offense and the nature and characteristics of the defendant, the need for general deterrence requires a Guidelines sentence. Computer hacking is becoming an ever increasing threat. Given the anonymity of the Internet and the proliferation of tools available to cyber criminals to evade law enforcement (*e.g.*, tools like the cryptors and proxy programs which Fedorek possessed), a sentence within the Stipulated Guidelines Range of 41 to 51 months is necessary to deter others from engaging in cybercrime.

CONCLUSION

For the reasons discussed above, the Government respectfully submits that a sentence within the Stipulated Guidelines Range of 41 to 51 months should be imposed.

Respectfully yours,

PREET BHARARA
United States Attorney

By: /Sarah Y. Lai/
Sarah Y. Lai / Daniel S. Noble
Assistant United States Attorneys
(212) 637-1944 / 2239

cc: Maurice Sercarz, Esq. (by ECF)

EXHIBIT E

ecngsans

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA

4 v.

14 Cr. 333 (JCF)

5 JUAN SANCHEZ,

6 Defendant.
-----x

7
8 New York, N.Y.
9 December 23, 2014
10 10:20 a.m.

11 Before:

12 HON. JAMES C. FRANCIS,

13 Magistrate Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
17 Southern District of New York

SARAH LAI

DANIEL NOBLE

18 Assistant United States Attorneys

19 PETER KATZ

20 Attorney for Defendant

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22

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24

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1 (Case called)

2 MS. LAI: Sarah Lai and AUSA Daniel Noble for the
3 government.

4 MR. KATZ: Peter Katz for Juan Sanchez.

5 THE COURT: Good morning.

6 Mr. Katz, is your client prepared to be sentenced at
7 this time?

8 MR. KATZ: He is.

9 THE COURT: Mr. Sanchez, are you ready for sentencing?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Mr. Katz, I know you have reviewed the
12 presentence report and that you have certain objections. Do
13 you want to voice those now?14 MR. KATZ: Certainly. Thank you. As you mentioned, I
15 put them in writing. I'm not going to belabor the record now.
16 I'll just make a general comment that I understand why they're
17 in there, at least from probation's perspective, but I think
18 it's highly unusual and it doesn't occur in any other type of
19 case. I'm not quite sure really what relevance it has, the
20 sections that I referenced. Paragraphs 6 and 7, 9 and 12
21 through 29 all refer to things that have nothing to do with
22 Mr. Sanchez whatsoever.23 They are background about an organization he's not a
24 part of, he never knew, has not dealt with, doesn't know any of
25 the codefendants, the cases are not related in any legal way,

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1 and I don't think they belong in the presentence report.

2 In some way, I can't unring the bell. You already
3 read it and you know about it, and there's nothing wrong with
4 that, but I don't think it belongs in the document, so that's
5 why I voiced the objections that I did.

6 THE COURT: Ms. Lai, do you wish to be heard?

7 MS. LAI: The background is that Mr. Sanchez is a
8 customer of this organization. The government made a decision
9 to separate him out and not make a reference to that particular
10 organization because of a very unique, compelling family and
11 mental health background that he has, plus the fact that he
12 recognized his problems and sought professional help before the
13 government knocked on his door, so we made a conscious decision
14 to keep that aspect of the case out of the information. That
15 said, factually, he is not a member of the organization *per se*;
16 however, he is a customer. Other customers in this case have
17 been charged as customers of the organization. His case is
18 unique because of the reasons that I mentioned. I think it
19 should stay in the sentence report because factually it's
20 correct, but if there's any special notation that can be made
21 that says he was a customer and not a working member of the
22 organization, that's fine, but I don't think the PSR is
23 inaccurate.

24 THE COURT: I will strike paragraphs 6 and 7 because I
25 agree that those refer to related cases which I think are not,

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1 in fact, related because it involves other customers with whom
2 Mr. Sanchez had no contact.

3 I won't strike paragraphs 9 and 12 through 29 because
4 I think those are specifically background and that's frankly
5 useful background to me because it allows me to understand what
6 the charged crime is. But I agree with Mr. Katz that they are
7 not significant to sentencing in the sense that Mr. Sanchez was
8 not involved except as a customer.

9 Mr. Katz, is there anything you'd like to say on
10 behalf of your client?

11 MR. KATZ: Thank you, your Honor. Very briefly, as I
12 referenced before, you have my submission of December 10 and I
13 rely on that. I'll just say, as AUSA Lai mentioned,
14 Mr. Sanchez is certainly unique in this case and unique in my
15 experience in computer hacking cases. He has a documented
16 mental health issue which we reference and is quite documented
17 over his entire life.

18 He sought help before the government came knocking on
19 his door as AUSA Lai mentioned. He's tried to fix the things
20 that have been wrong in his life, many of which are not of his
21 own doing. His family situation, his economic situation, the
22 things that he's had to endure as a child and growing up all
23 led him to today, but I don't think that it in any way defines
24 who he is.

25 To know Mr. Sanchez is to know what he's done since he

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1 engaged in this conduct, which is to try to get help himself,
2 to be cooperative with law enforcement, to be compliant while
3 on pretrial release and do everything that the Court has asked
4 of him and everything that the U.S. Attorney's Office has asked
5 of him. And I think that's why we're here in this Court with a
6 misdemeanor as opposed to a felony as I think many of the other
7 defendants who are otherwise similarly situated are.

8 I think a sentence of probation is appropriate. He
9 needs continued supervision. No doubt Mr. Sanchez is not out
10 of the woods from his personal situation. I think probation
11 can be very helpful in that regard in continued mental health
12 treatment, which just in the nine months I have known
13 Mr. Sanchez, I can see a marked difference in his mental state.
14 It's definitely helping and I think it needs to continue under
15 the auspices of probation. I think it would be beneficial to
16 him.

17 So that's what I ask your Honor to do, is to sentence
18 Mr. Sanchez to probation with the continued mental health
19 treatment that he has already been seeking.

20 THE COURT: Thank you.

21 Mr. Sanchez, is there anything you'd like to add to
22 what your attorney has said?

23 THE DEFENDANT: The only statement I suppose I wish to
24 give is that I wish to express apologies for those affected,
25 any and all family and friends included.

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1 THE COURT: Thank you.

2 Ms. Lai, is there anything the government would like
3 to add with respect to sentencing?

4 MS. LAI: Nothing further, your Honor.

5 THE COURT: Thank you. Well, I think I agree
6 generally that this case is a unique one. This crime appears
7 to have been a consequence of computer addiction, if you will,
8 which was itself symptomatic of the defendant's other mental
9 and emotional issues, and certainly, it does not appear that
10 the hacking involved here was malicious.

11 I will therefore sentence Mr. Sanchez in accordance
12 with probation's recommendation and I will sentence him to a
13 term of probation of one year on the following conditions:
14 That he shall not commit another crime; that he shall not
15 possess a controlled substance; he shall not possess a firearm
16 or destructive device; he shall refrain from any use of
17 controlled substances; he shall submit to a drug test within 15
18 days of today and two unscheduled drug tests thereafter as
19 directed by probation; he shall cooperate with the collection
20 of DNA as directed by the probation officer.

21 Furthermore, he shall submit to any reasonable search
22 of himself or his premises, including search of his computer,
23 which may involve the installation of a monitoring program to
24 observe his use of the computer. He shall participate in
25 mental health counseling as directed by probation. He shall

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1 abide by the directives of immigration officers. He shall
2 report to the probation office within 72 hours. And he shall
3 pay a special assessment of \$25 due immediately. Because of
4 Mr. Sanchez's financial circumstances, I find that it is not
5 appropriate to impose a fine.

6 Mr. Sanchez, you have the right to appeal the sentence
7 that I have imposed.

8 Is there anything further?

9 MR. KATZ: No, your Honor.

10 MS. LAI: Not from the government.

11 THE COURT: Thank you, all.

12 MR. KATZ: Thank you, your Honor. Happy holidays.

13 THE COURT: Thanks. Same to you.

14 (Adjourned)

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EXHIBIT F







EXHIBIT G

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

October 2012 Grand Jury

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
KAREN KAZARYAN,)
aka "Gary Kazaryan,")
Defendant.)

No. CR CR 13 00056

I N D I C T M E N T

[18 U.S.C. §§ 1030(a)(2)(C),
(c)(2)(B)(ii): Unauthorized
Access of Protected Computers;
18 U.S.C. § 1028A(a)(1):
Aggravated Identity Theft]

The Grand Jury charges:

COUNTS ONE THROUGH FIFTEEN

[18 U.S.C. §§ 1030(a)(2)(C), (c)(2)(B)(ii)]

A. INTRODUCTORY ALLEGATIONS

1. At all times relevant to this Indictment:

a. Defendant KAREN KAZARYAN, also known as Gary Kazaryan ("defendant KAZARYAN"), resided in Glendale, California, and was employed in Burbank, California.

b. Yahoo! Inc. ("Yahoo!") provided electronic mail ("e-mail") services to users all over the world.

c. Google, Inc. ("Google") provided e-mail services to users all over the world.

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1 d. Facebook, Inc. ("Facebook") provided social
2 networking services to users all over the world.

3 e. Microsoft, Inc. provided Skype Voice-Over-Internet
4 Protocol services ("Skype") to users all over the world.

5 f. Between 2009 and 2011, defendant KAZARYAN gained
6 unauthorized access to the e-mail accounts, Facebook accounts,
7 and Skype accounts of more than 100 victims residing in
8 California.

9 g. After defendant KAZARYAN gained unauthorized
10 access to these accounts, he would change the passwords to the
11 accounts, sometimes multiple times so that he had sole access to
12 the accounts for periods of time.

13 h. After defendant KAZARYAN gained unauthorized
14 access into these accounts, he would also obtain information
15 belonging to the victims from the accounts, including pictures,
16 communications, and information about other accounts.

17 i. Using the accounts to which he had obtained
18 unauthorized access, defendant KAZARYAN would then, in the guise
19 of the victims' online identities, contact friends or associates
20 of the victims in order to fraudulently persuade, or extort,
21 those individuals into removing their clothing so that defendant
22 KAZARYAN could view, and take pictures of, their naked or semi-
23 naked bodies via their webcams. Defendant KAZARYAN would also
24 use naked or semi-naked images of victims to further extort those
25 and other victims to remove their clothing so that defendant
26 KAZARYAN could view, and take pictures of, their naked or semi-
27 naked bodies.

II. UNAUTHORIZED ACCESS

2 2. On or about the dates set forth below, in Los Angeles
3 County, within the Central District of California, and elsewhere,
4 defendant KAZARYAN knowingly and intentionally accessed without
5 authorization and in excess of authorization, and thereby
6 obtained information, from a protected computer, as that term is
7 defined in Title 18, United States Code, Section 1030(e)(2)(B),
8 namely, a server of the service provider described below, in
9 furtherance of criminal and tortious acts, to wit, Extortion,
10 Threatening Letters, False Personation, Identity Theft, and
11 Contact by Electronic Communication with Intent to Annoy, in
12 violation of California Penal Code Sections 518, 520, 523, 530,
13 530.5, and 653m, respectively, and the California State Torts of
14 Intentional Infliction of Emotional Distress and Invasion of
15 Privacy, as set forth below:

COUNT	DATE	ACCOUNT HOLDER VICTIM	SERVICE PROVIDER
ONE	01-28-2010	M.O.	Yahoo!
TWO	02-18-2010	S.D.	Yahoo!
THREE	05-15-2010	H.K.	Yahoo!
FOUR	08-15-2010	C.P.	Facebook
FIVE	09-25-2010	A.P.	Skype
SIX	10-15-2010	T.M.	Skype
SEVEN	10-16-2010	T.M.	Skype
EIGHT	11-20-2010	A.M.	Facebook
NINE	11-20-2010	L.A.	Facebook
TEN	11-20-2010	L.A.	Skype
ELEVEN	11-21-2010	C.P.	Facebook
TWELVE	11-27-2010	A.P.	Skype

COUNT	DATE	ACCOUNT HOLDER VICTIM	SERVICE PROVIDER
THIRTEEN	12-12-2010	E.A.	Yahoo!
FOURTEEN	12-18-2010	E.A.	Facebook
FIFTEEN	12-18-2010	H.K.	Facebook

1 COUNTS SIXTEEN THROUGH THIRTY

2 [18 U.S.C. § 1028A(a)(1)]

3 3. The Grand Jury re-alleges paragraphs one and two of this
 4 Indictment, including all subparagraphs, as if fully set forth
 5 herein.

6 4. On or about the dates set forth below, in Los Angeles
 7 County, within the Central District of California, and elsewhere,
 8 defendant KAREN KAZARYAN, also known as Gary Kazaryan, knowingly
 9 and without lawful authority possessed and used means of
 10 identification of other persons, that is, the usernames of the
 11 below-described individuals, during and in relation to the acts
 12 of unauthorized access to a protected computer, as charged above
 13 in Counts One through Fifteen, and in violation of Title 18,
 14 United States Code, Sections 1030(a)(2)(C), (c)(2)(B)(ii):

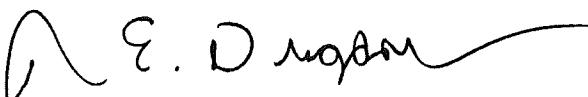
COUNT	DATE	VICTIM	RELATED COUNT
SIXTEEN	01-28-2010	M.O.	ONE
SEVENTEEN	02-18-2010	S.D.	TWO
EIGHTEEN	05-15-2010	H.K.	THREE
NINETEEN	08-15-2010	C.P.	FOUR
TWENTY	09-25-2010	A.P.	FIVE
TWENTY-ONE	10-15-2010	T.M.	SIX
TWENTY-TWO	10-16-2010	T.M.	SEVEN
TWENTY-THREE	11-20-2010	A.M.	EIGHT
TWENTY-FOUR	11-20-2010	L.A.	NINE
TWENTY-FIVE	11-20-2010	L.A.	TEN
TWENTY-SIX	11-21-2010	C.P.	ELEVEN
TWENTY-SEVEN	11-27-2010	A.P.	TWELVE

COUNT	DATE	VICTIM	RELATED COUNT
TWENTY-EIGHT	12-12-2010	E.A.	THIRTEEN
TWENTY-NINE	12-18-2010	E.A.	FOURTEEN
THIRTY	12-18-2010	H.K.	FIFTEEN

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12 Foreperson
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15 ANDRÉ BIROTTÉ JR.
United States Attorney

16 

17 ROBERT E. DUGDALE
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EXHIBIT H

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9 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

No. CR 13-56-GHK

14 v.

15 KAREN KAZARYAN,
16 aka "Gary Kazaryan,"

GOVERNMENT'S SENTENCING POSITION
AND OPPOSITION TO DEFENDANT'S
SENTENCING POSITION; EXHIBITS
FILED CONCURRENTLY UNDER SEAL

17 Defendant.

18
19 Plaintiff United States of America, by and through its counsel
20 of record, the United States Attorney for the Central District of
21 California and Assistant United States Attorney Tracy L. Wilkison,
22 hereby files its sentencing position and opposition to defendant
23 Karen Kazaryan's sentencing position.

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This Opposition is based upon the attached memorandum of points and authorities, the exhibits filed concurrently under seal, the Presentence Investigation Report and recommendation letter, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: November 22, 2013

Respectfully submitted,

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United States Attorney

ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

/s/
TRACY L. WILKISON
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

TABLE OF CONTENTS

	<u>DESCRIPTION</u>	<u>PAGE</u>
2	MEMORANDUM OF POINTS AND AUTHORITIES.....	1
3		
4	I. INTRODUCTION.....	1
5		
6	II. DEFENDANT'S OBJECTIONS SHOULD BE OVERRULED.....	3
7		
8	A. Defendant's Victims Number More Than 250.....	3
9		
10	B. Defendant's Offense Involved Sophisticated Means.....	7
11		
12	III. DEFENDANT DESERVES AN UPWARD DEPARTURE.....	9
13		
14	IV. BASED ON THE § 3553 FACTORS, A SENTENCE OF 72 MONTHS IS	
15	APPROPRIATE.....	15
16		
17	A. 18 U.S.C. § 3553(a)(1).....	15
18		
19	B. 18 U.S.C. § 3553(a)(2).....	21
20		
21	C. 18 U.S.C. § 3553(a)(6).....	22
22		
23	V. CONCLUSION.....	25
24		

TABLE OF AUTHORITIES

<u>DESCRIPTION</u>	<u>PAGE</u>
Cases	
<u>Nichols v. United States</u> , 511 U.S. 738 (1994).....	19
<u>United States v. Barrington</u> , 648 F.3d 1178 (11th Cir. 2011).....	5
<u>United States v. Blixt</u> , 548 F.3d 882 (9th Cir. 2008).....	4
<u>United States v. Feigin</u> , 2010 WL 376278 (11th Cir. 2010)	24
<u>United States v. Gonzalez</u> , 541 F.3d 1250 (11th Cir. 2008).....	15
<u>United States v. Ledgard</u> , 2012 WL 3996855 (C.D.Ca. September 12, 2012).....	5
<u>United States v. Moon</u> , 513 F.3d 527 (6th Cir. 2008).....	15
<u>United States v. Popa</u> , 361 Fed.Appx. 854 (9th Cir. 2010).....	4
<u>United States v. Watts</u> , 519 U.S. 148 (1997).....	19
Statutes	
18 U.S.C. § 1028(d)(7).....	3
18 U.S.C. § 1028A(a)(1).....	2, 4
18 U.S.C. § 1030(3)(2).....	10
18 U.S.C. § 2252A.....	11
18 U.S.C. § 3553(a).....	15, 21, 22
18 U.S.C. §§ 1030(a)(2)(C).....	1
Rules	
U.S.S.G. § 2B1.1.....	passim

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Karen Kazaryan, aka Gary Kazaryan, is a sexual cyber
4 terrorist. He hacked into hundreds of victims' email, Facebook, and
5 Skype accounts using their usernames and passwords or password reset
6 questions. He then methodically searched their accounts for naked
7 pictures, passwords, and the contact information of their friends.
8 He had two goals every time that he accessed these accounts: get
9 more naked pictures in any way he could, and get more victims. Once
10 he had access to an account, he would take over the account and
11 pretend to be that person to her friends. He would persuade the
12 friends to show him their breasts or provide naked pictures. He
13 also persuaded them to provide their usernames and passwords so that
14 he could obtain access to their accounts too. Once he had stolen
15 the naked pictures from these women, he went further, returning to
16 them in the guise of another victim account, and demanding that they
17 provide him with more sexually explicit videos. He "sextorted"
18 their compliance, forcing them to strip for the camera while he took
19 yet more pictures. He was indifferent to their pain, to their pleas
20 to stop, and to their requests for privacy. If they hesitated at
21 all, he posted previously obtained pictures publicly, causing the
22 horrified victims to receive calls from other friends about how
23 their entire friend network could now see them naked. His victims
24 were devastated and felt like they had been raped. They continue to
25 be thoroughly traumatized by his criminal conduct.

26 For his crimes, defendant was charged with fifteen counts of
27 unauthorized access of protected computers, in violation of 18
28 U.S.C. §§ 1030(a)(2)(C), (c)(2)(B)(ii), and fifteen counts of

1 aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1).
2 He pleaded guilty on July 15, 2013, to one count each of
3 unauthorized access and aggravated identity theft, pursuant to a
4 written plea agreement.

5 On September 3, 2013, the United States Probation Office issued
6 its Presentence Investigation Report ("PSR") in this matter. The
7 PSR calculated a total offense level for the unauthorized access
8 count as 13, and found defendant to be in Criminal History Category
9 I, and found the advisory guideline range, with the mandatory
10 consecutive sentence of two years imprisonment, to be 36 to 42
11 months. Recognizing that the Sentencing Guidelines do not
12 adequately address defendant's crimes, the Probation Office
13 recommended a sentence of 48 months' imprisonment.

14 The government has no objections to the Guideline calculations.
15 On November 20, 2013, defendant filed his sentencing position. In
16 it, he first makes two objections to the PSR: (1) to the six level
17 increase for number of victims in paragraphs 73-78; and (2) to the
18 two level increase for sophisticated means in paragraphs 79-82. He
19 then argues for a sentence of 30 months' imprisonment based on the
20 Section 3553(a) factors.

21 Because defendant's objections lack merit, they should be
22 overruled. Moreover, for the reasons set forth below, including the
23 fact that the sentencing guidelines do not adequately capture
24 defendant's sextortionate conduct, the government recommends a
25 sentence of imprisonment of 72 months, or six years.

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1 **II. DEFENDANT'S OBJECTIONS SHOULD BE OVERRULED**

2 **A. Defendant's Victims Number More Than 250**

3 Defendant first objects to the increase of six levels for more
4 than 250 victims on the basis that victims who had their usernames
5 used without authorization are not properly counted as victims, and
6 that the number of victims includes only those named in the
7 Indictment. Defendant's objections lack merit and should be
8 overruled.

9 The PSR correctly states that Application Note 4(E)(ii) to
10 U.S.S.G. § 2B1.1 affirms that for purposes of calculating the number
11 of victims, in a case involving means of identification, "victim"
12 means any individual whose means of identification was used
13 unlawfully or without authority. "'Means of identification' has the
14 meaning given that term in 18 U.S.C. § 1028(d)(7)." U.S.S.G. § 2B1.1
15 cmt. n.1. Under § 1028(d)(7), "means of identification" includes
16 "any name or number that may be used, alone or in conjunction with
17 any other information, to identify a specific individual, including
18 any . . . name . . . or electronic identification number [or]
19 address." There is no requirement, as defendant suggests, that the
20 means of identification be used in furtherance of a criminal or
21 tortious act for the individual to qualify as a victim; only that
22 the means of identification be "used unlawfully or without
23 authority."¹

24 In this case, defendant used the unique usernames - which are
25 both names and electronic addresses under the plain language of
26

27 _____
28 ¹ That said, as discussed below, the victims' means of
identification in this case were in fact used in furtherance of
criminal and tortious acts.

1 Section 1028(d)(7) - of more than 370 victims. These usernames
2 identify persons very specifically to the provider; no two people
3 can have the same username at the same provider. For example, there
4 may be many John Smiths, but there is only one JSmith365@gmail.com.
5 Indeed, in pleading guilty to count 27, which charges a violation of
6 Aggravated Identity Theft, in violation of 18 U.S.C. § 1028A(a)(1),
7 defendant agreed that these usernames were means of identification,
8 that he used them knowing that they belonged to real victims and
9 that he had no lawful authority to use them. In the factual basis,
10 he agreed: "In addition, during and in relation to this unauthorized
11 access to a computer in furtherance of a state crime or tort,
12 defendant intentionally obtained, possessed and used without legal
13 authority a means of identification of another person, specifically
14 the user id for the computer accounts that he accessed. Defendant
15 knew that these user ids belonged to a real person, and he acted
16 without their permission and without lawful authority." CR 42.

17 Defendant used these usernames to assume the victims' online
18 identities, connect with their friends and family, search for
19 images, search for new victims, fraudulently persuade victims to
20 pose naked on Skype, and extort other victims to pose naked as well.
21 He cannot now object to the inclusion of these victims in
22 calculating the Sentencing Guidelines. See United States v. Popa,
23 361 Fed.Appx. 854, 856 (9th Cir. 2010) (unpublished) (holding that a
24 defendant had committed aggravated identity theft in making drivers'
25 licenses that included the real names of other people, but fake
26 information, or Popa's information, for the remainder of the
27 licenses, because the names uniquely identified the victims of the
28 identity theft crimes); United States v. Blixt, 548 F.3d 882, 887-

1 88 (9th Cir. 2008) (holding that a forged signature constitutes a
2 means of identification, because it is a name in a different form,
3 and because it, taken in conjunction with other information as a
4 whole, will identify a specific individual. "[Section 1028]"
5 includes the use of a name, alone or in conjunction with any other
6 information, as constituting the use of a means of identification so
7 long as the information taken as a whole identifies a specific
8 individual. There is nothing in the language of the statute that
9 suggests the use of another's name in the form of a signature is
10 somehow excluded from the definition of 'means of
11 identification.'"); United States v. Barrington, 648 F.3d 1178, 1193
12 (11th Cir. 2011) ("[c]learly, the usernames and passwords,
13 considered together, constituted a 'means of identification' for
14 those specific individuals and [the defendant] knew that."); United
15 States v. Ledgard, 2012 WL 3996855, *14 (C.D.Ca. September 12,
16 2012)(defendant found guilty of Section 1028A by Judge Pregerson
17 based on his use of victim's username to access account); United
18 States v. Mijangos, 10-743-GHK (C.D.Ca. September 1, 2011)(Court
19 imposed enhancement based on number of victims whose usernames were
20 used, finding that the screen names are a means of identification).

21 Defendant's objection as to the number of victims also fails.
22 Every time defendant accessed an email, Facebook, or Skype account,
23 he necessarily had to use the username and either the password or
24 the password reset questions. He could not have gained the access
25 to the accounts without using the means of identification. The
26 usernames that defendant used to access accounts are separately
27 filed under seal in Exhibit A. Exhibit A contains lists of accessed
28 accounts obtained in one of two ways: (1) based on the evidence on

1 defendant's computer, found during the search in this case, which
2 showed him accessing other people's accounts; (2) based on records
3 maintained by Facebook, Yahoo, and Google, which showed defendant's
4 IP address accessing other people's accounts. The lists have been
5 cross-referenced, and duplicates or persons with multiple accounts
6 have been deleted. What remains is 372 individual victims
7 identified as having their accounts actually accessed through
8 defendant's use of their username, not simply the nine victims named
9 in the indictment. The six-level increase for more than 250 victims
10 is entirely appropriate.

11 Defendant objects that if the victims did not know that their
12 accounts were hacked, then they cannot be counted as victims, and
13 further asserts that there is no evidence that the usernames were
14 used in furtherance of a criminal or tortious act. These objections
15 lack merit. First, nothing in the Sentencing Guidelines supports
16 defendant's suggested amendment to the definition of "victim."
17 Second, the entire point, the *raison d'etre*, of defendant's
18 unauthorized use of his hundreds of victims' means of identification
19 was to gain access to their accounts so that he could (1) search for
20 naked pictures to steal; (2) pose as the victim to allow him to
21 victimize others; and (3) gain the usernames and passwords of other
22 victims, all in violation of Extortion, Threatening Letters, False
23 Personation, Identity Theft, and Contact by Electronic Communication
24 with Intent to Annoy, in violation of California Penal Code Sections
25 518, 520, 523, 530, 530.5, and 653m, respectively, and the
26 California State Torts of Intentional Infliction of Emotional
27 Distress and Invasion of Privacy. The evidence on defendant's
28 computer confirms that defendant methodically worked to expand his

1 victim network and to terrorize yet more people. Defendant's
2 assertion that the majority of the victims in this case suffered
3 "neither actual nor emotional loss, nor were inconvenienced," flies
4 in the face of reality.

5 Defendant's objection should be overruled and the six-level
6 enhancement applied.

7 **B. Defendant's Offense Involved Sophisticated Means**

8 Defendant next objects to the two level increase for
9 sophisticated means. U.S.S.G. § 2B1.1(b)(9)(C) states: "if . . .
10 the offense otherwise involved sophisticated means, increase by 2
11 levels." The commentary explains that "sophisticated means"
12 include:

13 especially complex or especially intricate offense conduct
14 pertaining to the execution or concealment of an offense.
15 For example, in a telemarketing scheme, locating the main
16 office of the scheme in one jurisdiction but locating
17 soliciting operations in another jurisdiction ordinarily
18 indicates sophisticated means. Conduct such as hiding
19 assets or transactions, or both, through the use of
20 fictitious entities, corporate shells, or offshore
21 financial accounts also ordinarily indicates sophisticated
22 means.

23 U.S.S.G. § 2B1.1(b)(9)(C), cmt. n.8(B).

24 As the PSR points out, defendant's activities in this case
25 involved hiding transactions through the use of fictitious
26 entities or names. PSR, ¶ 82. His computer showed evidence of
27 programs designed to hide his IP addresses so that he could
28 further conceal his crimes from law enforcement. PSR, ¶¶ 81,
82.

Indeed, defendant's crimes were "especially complex" and
especially intricate," both in the execution and concealment of
the offense. Defendant took elaborate steps to take over as

1 many victim accounts as possible, so that he could use his
2 victims as a shield in order to gain the trust of other
3 victims. He would pose as one victim, and ask others for their
4 passwords or password reset information. For example, the
5 Skype chat filed under seal as Exhibit B shows defendant as one
6 victim, first asking the second victim to "flash" him, and
7 then, pretending that he can solve a computer problem, asks for
8 her username and password (at line 609-14). The second victim,
9 thinking that she is speaking with the first victim, supplies
10 it. Defendant would then access her accounts and network out
11 from there to find other victims. This happened numerous times
12 with many different victims.

13 Defendant also used his ability to access victim accounts
14 to obtain naked pictures, pretending to be one victim to gain
15 the confidence of another so that she would show her naked
16 breasts to him. Once he had that, he would extort more sexual
17 activity from the second victim. For example, in the Skype
18 chat filed under seal as Exhibit C, defendant on one day
19 pretended to be the first victim and fraudulently persuaded the
20 second victim to show her breasts. When she did, he took a
21 picture of her and saved it on his computer. He then came back
22 a second day, and was able to extort her into revealing her
23 breasts again and again took pictures. Defendant did this
24 frequently and with many of his victims. As detailed above, he
25 ultimately was able to access and take over well over 350
26 online identities, and he had over 1,100 naked or semi-naked
27 pictures of women on his computer.

28

1 Defendant contends that because the government was able to
 2 successfully investigate defendant's crimes, they were not
 3 sophisticated. However, the fact that ultimately, the
 4 government was able to track down defendant's IP addresses to
 5 his home and work, and discover evidence of his crimes on his
 6 computer, does not make defendant's crimes unsophisticated. If
 7 prosecution equalled unsophisticated, the enhancement would
 8 never be applied. Similarly, defendant's argument that the
 9 sophisticated means enhancement is duplicative of USSG
 10 § 2B1.1(b)(16)(a) (applying a two-level increase for a § 1030
 11 offense where there was intent to obtain personal information)
 12 fails; not all unauthorized computer access cases are
 13 necessarily exceptionally sophisticated. Here, the enhancement
 14 is appropriate because defendant designed special precautions
 15 in setting up his crimes specifically in order to avoid
 16 detection and to continue extorting his victims. Defendant's
 17 crimes were more complex than the average case under this
 18 Guideline. Given both the intricacy and the level of
 19 concealment of defendant's crimes, he qualifies for the
 20 sophisticated means enhancement, and defendant's objection
 21 should be overruled.

22 **III. DEFENDANT DESERVES AN UPWARD DEPARTURE**

23 The Probation Office recommends a sentence of 48 months'
 24 imprisonment, which includes a six-month upward departure from the
 25 Sentencing Guidelines. The government agrees that an upward
 26 departure is warranted, but recommends a 30-month upward departure,
 27 for an ultimate sentence of 72 months. In the alternative, the
 28 government recommends a variance under Section 3553(a), as discussed

1 below, to the same sentence, based on defendants conduct, history,
2 and circumstances.

3 U.S.S.G. § 2B1.1 is the Guidelines section used for section
4 1030

5 offenses like that to which defendant has pleaded guilty. This is
6 the same section used for offenses involving, among other things,
7 theft, stolen property, property damage or destruction, fraud,
8 forgery, and counterfeiting. Accordingly, the section generally
9 gauges the seriousness of the offense by the amount of monetary
10 loss. The commentary recognizes, however, that an upward departure
11 is warranted where the nature of the crime is non-monetary. See
12 U.S.S.G. § 2B1.1 cmt. n.19. Among the non-exhaustive list of
13 factors warranting an upward departure are the following:

14 (i) A primary objective of the offense was an aggravating,
15 non-monetary objective. For example, a primary objective
was to inflict emotional harm.

16 (ii) The offense caused or risked substantial non-monetary
17 harm. For example, the offense cause physical harm,
18 psychological harm, or severe emotional trauma, or
resulted in substantial invasion of a privacy interest
(through, for example, the theft of personal information
such as medical, educational, or financial records). . . .

19 (v) in a case involving stolen information from a
20 protected computer," as defined in 18 U.S.C. § 1030(3)(2),
21 the defendant sought the stolen information to further a
broader criminal purpose.

22 The PSR recommends an upward departure on this basis, but the
23 government respectfully submits that the departure does not go far
24 enough. In this case, a substantial, 30 month, upward departure is
25 warranted for this defendant because the monetary adjustments in
26 § 2B1.1 do not properly capture the seriousness of defendant's
27 conduct, nor the true loss to the victims.

28

1 Here, defendant was not motivated at all by monetary gain.
2 There is no increase for loss in this case. Rather, defendant's
3 currency was naked pictures of women, and, using that measure, there
4 was substantial loss to the victims. Defendant intentionally hacked
5 into his victims accounts, made contact with his victims, and played
6 psychological games with them intending to inflict emotional harm.
7 The nonchalant manner in which he terrorized these women for his own
8 pleasure, and the scale on which he did it, are disturbing. In one
9 chat, defendant called it his "hobby." Exhibit D, line 589. Some
10 of the images were of minor girls, and thus child pornography or
11 child erotica, which is itself a very serious crime. See 18 U.S.C.
12 § 2252A; USSG § 2G2.2. On defendant's computer, agents discovered
13 more than 8,000 instant message chats where defendant was attempting
14 to obtain email accounts and account passwords and pictures of naked
15 or semi-naked women and sexually explicit conduct. PSR, ¶ 62.
16 There were more than 1,100 saved photos of naked or semi-naked
17 women. Id. There is nothing in the Sentencing Guidelines
18 calculation that accounts for that loss. Indeed, if each naked
19 picture were afforded the same loss calculation as an unused credit
20 card, a conservative loss estimate would be \$550,000, or an increase
21 of 14 levels (gained at any loss beyond \$400,000). The resulting
22 Guideline would be 70-87 months, plus two years consecutive for the
23 Section 1028A conviction, for a total Guideline sentence of 94-111
24 months.

25 Moreover, as the PSR points out, the account holder victims
26 reported that defendant changed their passwords multiple times,
27 locking them out of their accounts. They were forced to cancel
28 accounts, start new ones, and re-establish contact with friends.

1 The guidelines do not account for the fact that the victims spent
2 many hours attempting to undo the damage that defendant caused to
3 their accounts and the severe invasion of their privacy.

4 An upward departure is also appropriate because Section 2B1.1
5 does not adequately address the intentional infliction of emotional
6 distress that defendant visited upon his victims. The PSR well
7 discusses a small sampling of the emotional trauma and psychological
8 harm that the victims suffered at defendant's hands. PSR, ¶¶ 35-60.
9 The government also attaches as Exhibits B-E some of the instant
10 message chats (4 out of 8,000) found on his computer. Each time
11 defendant gained access to an account, he would plunder it searching
12 for pictures he could steal and use to extort further pictures,
13 passwords he could steal and use to get into other accounts, and
14 contacts that he could victimize next. With total disregard for his
15 victims, defendant would take pictures of those who trusted he was
16 who he said he was, and use them to further extort the victims. As
17 the Probation Office notes in the recommendation letter, "not only
18 was this conduct egregious, defendant's callousness and complete
19 disregard for the demand victim is evident in that he would 'allow'
20 the demand victim to cover her face when he took the naked or semi-
21 naked body pictures of the demand victim."

22 Defendant's assaults took a tremendous toll on his victims.
23 They lost their privacy. They felt raped. And for many of them,
24 realizing that defendant was someone they knew was further
25 victimization. As the PSR states, many of defendant's victims were
26 people that he knew or went to school with. PSR, ¶ 29. He used his
27 knowledge of these people to gain access to their accounts, and then
28 spread out to other victims. For this reason, many victims have

1 reported to the government an extreme reluctance to appear in court
2 to see their former friend or acquaintance, and all have requested
3 that their names not be used in any letters to the court. For
4 example, filed under seal as Exhibit F is a letter from one victim
5 who is too scared to be named. This victim is one who was sextorted
6 by defendant into providing naked pictures. She writes that the
7 fear caused by defendant has still not left her mind. She states
8 that defendant was a family friend, and because of his abuse of her,
9 she says, "I am convinced that he will be a threat to both my
10 community and me. He certainly made threatening comments prior to
11 his arrest and I fear the effects of such an individual being
12 released into our community, should he not face the appropriate
13 consequences for his crime." She no longer feels safe on the
14 Internet based on his manipulation of her.

15 Other victims reported the effects of defendant's crimes when
16 they spoke with law enforcement. These reports are filed under seal
17 as Exhibit G. For example, victim S.A. (referenced at PSR, ¶¶ 57-
18 60) stated that she feels "threatened and terrorized" by defendant.
19 She closed down her accounts and created new ones. She was very
20 scared that her photos would get out and damage her reputation.
21 This fear about photos becoming public and damaging their reputation
22 is one repeated in the Skype chats, for example at Exhibit D, line
23 593, and is the main means by which defendant was able to coerce his
24 victims: by threatening to publicly post the pictures he already
25 had.

26 As another example, victim S.D. (PSR, ¶¶ 55, 56) reported that
27 she "was very scared, could not sleep and felt traumatized. She is
28 still very paranoid about using computers and instant messaging with

1 friends." Victim D.M. (PSR, ¶¶ 47-51) stated that she "is
2 emotional[ly] distraught and cried profusely for the rest of the
3 evening [following the extorted provision of naked pictures]." She
4 stated that she "felt like she was raped, and was scared to log into
5 her email account." Victim H.K. (PSR, ¶¶ 57-60) stated that she
6 feels "threatened and terrorized" by defendant. She had closed down
7 her Facebook account, changed her email accounts, and was fearful of
8 using the Internet and computer. At a later interview, she stated
9 that she felt threatened, scared, and attacked. Victim M.M. (PSR,
10 ¶¶ 43-46) stated that she was upset, and fearful, and had to close
11 down all of her email and social media sites. She stated that she
12 experienced depression, and continues to be upset about it. Victim
13 A.A. (PSR, ¶¶ 37-42) said that she felt "extremely violated" and was
14 fearful of what defendant would do with the photographs he obtained.
15 Victim H.A., whose naked picture was posted on victim C.P.'s
16 Facebook page by defendant as an incentive to get victim H.A. to
17 show him her breasts (PSR, ¶ 36), felt scared and unsafe. She
18 reported calling victim C.P. during the attack, crying, and asking
19 her to take down the picture and delete all of her friends.
20 Ultimately, Victim H.A. deactivated her Facebook account and still
21 feels scared.

22 Given the extreme emotional violence that defendant visited
23 upon these women, and given the persistent and pervasive efforts by
24 defendant to victimize as many people as possible, the six-month
25 upward departure recommended by the Probation Office is insufficient
26 to fully capture his conduct. The government recommends a sentence
27 of 72 months, or a 30 month upward departure, because nothing less
28 can account for the true loss defendant caused. Indeed, as noted,

1 the recommendation is less than what would result from an
2 approximate monetization of defendant's currency of choice: naked
3 pictures of women, obtained without their consent and against their
4 will.

5 **IV. BASED ON THE § 3553 FACTORS, A SENTENCE OF 72 MONTHS IS**
6 **APPROPRIATE**

7 Taking the advisory Guidelines into consideration, including
8 the upward departure, the government believes that a sentence
9 including 72 months' imprisonment is sufficient but not greater than
10 necessary to comply with the enumerated purposes of sentencing and
11 the factors set forth in 18 U.S.C. § 3553(a).

12 **A. 18 U.S.C. § 3553(a)(1)**

13 **1. Nature and Circumstances of the Offense**

14 18 U.S.C. § 3553(a)(1) requires the Court to consider the
15 nature and circumstances of the offense and the history and
16 characteristics of defendant. As discussed above, defendant's
17 crimes and the impact on his victims were truly terrible. The
18 emotional distress caused to the victims is a necessary part of the
19 evaluation of the nature and circumstances of defendant's offense.

20 See, e.g., United States v. Moon, 513 F.3d 527, 534 (6th Cir. 2008)
21 (affirming sentence where district court permitted testimony of
22 relatives of deceased patients as relevant to nature and
23 circumstances of the fraud offense). Some courts have considered
24 harm to the victim under Section 3553(a)(2) as well. See, e.g.,
25 United States v. Gonzalez, 541 F.3d 1250, 1254 (11th Cir. 2008)
26 (noting district court's consideration of "desperation of the
27 victims" when considering the nature and circumstances of offense
28 and harm to victims when considering the need to reflect the

1 seriousness of the offense, to promote respect for the law, and to
2 provide just punishment).

3 In this case, defendant attacked his victims on an almost daily
4 basis. For example, Exhibit H is a chart compiled with Facebook
5 records of accounts accessed from defendant's home IP address and
6 shows that defendant, just between November 1, 2010 and February 23,
7 2011, accessed his victims' accounts almost daily. Notably, the
8 chart does not include the times he accessed the accounts from his
9 work IP address, nor does it include the entire year of 2010 that he
10 was accessing victim accounts, nor does it include any access beyond
11 Facebook. It nonetheless speaks powerfully about defendant's
12 dedication to his crime.

13 In addition, the captured instant messages themselves
14 demonstrate defendant's callousness, his abuse of power, and his
15 complete disrespect for women. For example, in Exhibit D, defendant
16 posed as victim T.M., and had a Skype conversation with victim M.M.
17 In his Skype conversations with victims, defendant was able to
18 persuade his victims that his video camera was malfunctioning, and
19 he could type his part of the conversation while watching the victim
20 on her camera. After he persuaded M.M. to show him her breasts, he
21 later spoke with her and demanded that she "flash me regularly." He
22 was completely dismissive of her statements that she could report
23 him and threatened to post the picture of her flashing him on all of
24 her friends' accounts. He said "at this point I have power," and
25 ignored her pleas to stop. When she expressed concern that he was
26 going to ruin her good reputation, he was unmoved and continued to
27 demand the naked pictures.

28

1 In Exhibit C, defendant posed as victim A.P. and victimized
2 victim A.A. Again, after gaining a picture of her flashing by
3 fraud, he returned to demand more. He trivialized her attempts to
4 fight back, and flippantly said that he had "incentives" to cause
5 A.A. to "flash[] me for about a minute and play with her boobs... I
6 don't care if her face is in it." He said if she did, "I wont
7 facebook the picture of her flashing :)" He was indifferent to her
8 cries for mercy and demanded that she appear on screen "no face 2
9 min topless and just rub your boobs." He pretended not to be "some
10 Armenian person that we know," as she was concerned about that, and
11 further demanded her compliance.

12 These chats comport with the reports by other victims of the
13 horrific nature of defendant's conduct. The conduct was also
14 repeated and long-lasting for well over a year, and involving
15 hundreds and hundreds of victims. The sheer volume of defendant's
16 hacks and victims sets him apart. It can be no understatement to
17 say that the nature and circumstances of the offense call for a very
18 significant sentence.

19 Defendant contends that a lower sentence is appropriate in this
20 case because "there were [no] attempts to circulate any comprising
21 [sic] pictures into the general public domain." This is absolutely
22 not true. Defendant repeatedly posted naked pictures of his victims
23 onto their, or their friends', Facebook pages in order to force them
24 to show him their breasts. He showed no remorse about doing so, and
25 about threatening to do so, in his communications with the victims;
26 rather, he seemed quite smug about his power. Moreover, defendant's
27 argument that he should be given a lower sentence because he has
28 "spared the victims the stress, anxiety and obvious personal and

1 emotional apprehension that comes from having to testify in open
2 court about the events in question" is offensive given the stress,
3 anxiety, and obvious personal and emotional apprehension he has
4 already given them.

5 2. Defendant's History and Circumstances

6 Defendant is a 27-year-old man who has been a daily marijuana
7 user with a spotty employment record. He received an associate's
8 degree, and "is skilled in marketing and the creation of website
9 concepts." PSR, ¶ 148. However, he chose to use those skills to
10 break the law and victimize others. Defendant argues that he was
11 young at the time of the offense, and so now he "obviously has the
12 intellect to control any further inappropriate, impulsive actions";
13 however, there is no evidence that this is true. Defendant was 24
14 and 25 at the time of the offense. This is well after when most
15 people graduate college and many have been working for years. There
16 is nothing to substantiate defendant's assertion that he lacked that
17 intellect two years ago but suddenly has it now.²

18 Defendant's prior arrest for rape of an unconscious person,
19 oral copulation of an unconscious person, sexual penetration by a
20 foreign object, rape by use of drugs, and oral copulation by
21 anesthesia or controlled substance must be considered. While it did
22 not result in conviction, it cannot be ignored as evidence of
23 defendant's character and regard for others. Defendant was
24

25 ² Defendant also claims that he has strong family and community
26 support. However, he had this support before and it did not affect
27 his choices. Moreover, the quality of this support is dubious: as
28 was learned during the detention hearings in this case, his parents
are both convicted felons for welfare fraud, and his brother also
has a lengthy felony criminal record. Notably, only one family
member chose to write a letter in support.

1 identified by a victim of rape as the perpetrator. She stated that
2 defendant offered her a drink at a bar, and that after that she
3 could not remember exactly what happened. She reported that she
4 next remembered defendant raping her in the back seat of a car. Her
5 friends reported that she was near unconscious in the car when they
6 discovered her. Defendant acknowledged in a recorded inmate call
7 that he had sexual contact with the victim, but alleged it was
8 consensual. PSR, ¶ 104-114.

9 Defendant submits that the case was not dismissed for failure
10 to bring the case to court in time, as the PSR states, but says that
11 that the case was instead dismissed because the prosecution had
12 insufficient evidence to proceed to trial. This is false.³ The
13 undersigned has spoken with the Deputy District Attorney assigned to
14 the case, and she stated that the case had been set for trial
15 following a preliminary hearing. Unfortunately, the investigating
16 officer had failed to stay in touch with a key witness, S.V., who
17 had graduated from college and moved to parts unknown. The Deputy
18 District Attorney stated that she dismissed only because this
19 witness could not be located. She did not base the dismissal on any
20 alleged evidence regarding the victim, as defendant asserts,
21 especially given that the victim was unconscious during the attack.
22 Rather, she stated that the victim wanted to proceed, and there
23

24 ³ Even if it were true, the inability to prove the rape beyond a
25 reasonable doubt would not preclude its consideration at sentencing.
26 Nichols v. United States, 511 U.S. 738, 747 (1994) (sentencing court
27 may consider conduct that did not result in conviction without
violating Due Process); see also United States v. Watts, 519 U.S.
148, 157 (1997) ("a jury's verdict of acquittal does not prevent the
sentencing court from considering conduct underlying the acquitted
charge, so long as that conduct has been proved by a preponderance
28 of the evidence.").

1 was also substantial DNA evidence tying defendants to the crime, so
2 that if S.V. ever can be located, and it is within the statute of
3 limitations, she intends to re-file the case.⁴

4 Defendant's prior rape charge, as well as defendant's other
5 pending drug charges as discussed at paragraphs 115-123 of the PSR,
6 are very telling. The crimes for which defendant stands convicted
7 ultimately have a lot of similarity to the prior allegations. Both
8 represent an abuse of power, a lack of respect for women and their
9 personal space, and an extreme absence of judgement. It also makes
10 clear that defendant's criminal history calculation, showing zero
11 points, does not adequately convey defendant's contact with, and
12 disregard for, law enforcement. Defendant's conduct in this case
13 occurred while the rape case was pending, and the drug charges began
14 after the search warrant in this case was executed. In truth,
15 defendant has no regard for law enforcement, or other people,
16 specifically women.

17 Defendant also claims that he was "more of a voyeur rather than
18 a sexual predator wanting physical contact with the victims," and
19 that there is no danger of further inappropriate conduct. He points
20 to the report of Dr. Ronald Markman in support. As a starting
21 point, Dr. Markman's report is useless, and should be wholly
22 rejected. As background to prepare himself for this case, Dr.
23 Markman read only the indictment. Defendant's Exhibit A, page 1.
24 He did not read any of the discovery, or the PSR, or any other
25 materials. He did not read the exhibits attached to this position
26

27 ⁴ In defendant's report, attached as Exhibit A, Dr. Markman
28 repeats the defendant's statement that the case has been dismissed
with prejudice. This is also false.

1 and produced in discovery. He did not read the reports of
2 interviews with the victims. He did not read any of the reports
3 from defendant's prior rape offense. Then, Dr. Markman met with
4 defendant once, in his office, for what one can imagine was at most
5 a couple of hours. Defendant's Exhibit A, page 1. No tests were
6 performed. And, in fact, no critical thinking was engaged, as Dr.
7 Markman's report simply recites what defendant reported to him
8 during their chat. Based on that, Dr. Markham concludes both that
9 "there is no history of ongoing aggressive sexual misconduct" and
10 "the risk of future aggressive sexual behavior is low." These
11 conclusions are as baseless as the evidence upon which he grounds
12 them.

13 In truth, defendant is far more than "a voyeur" who is not
14 sexually aggressive. A voyeur, by definition, only watches from
15 afar; he does not act and does not interact. Defendant is the exact
16 opposite. He is a sexual cyber-terrorist, who reached out through
17 his computer to compel women to strip for him. The women complied,
18 even though he was not physically present in the room, because to
19 them it was precisely the same. They felt raped. He thrived on his
20 power over the victims, and taunted them with it. Defendant cannot
21 now pretend that because he hid behind a computer username that he
22 was not behaving aggressively. Calling it simple "immature bad
23 judgment" drastically understates both the experience of the victims
24 and defendant's methodical, long-lasting, and horrific crimes.

25 **B. 18 U.S.C. § 3553(a)(2)**

26 18 U.S.C. § 3553(a)(2) requires the Court to consider the need
27 for the sentence to reflect the seriousness of the offense, to
28 promote respect for the law, to provide just punishment for the

1 offense, to afford adequate deterrence to criminal conduct, to
2 protect the public from further crimes of defendant, and to provide
3 defendant with needed educational or vocational training, medical
4 care, or other correctional treatment in the most effective manner.
5 This factor also supports the government's recommended sentence of
6 72 months.

7 A significant period of incarceration is necessary given the
8 serious nature of defendant's offense, including the number of
9 victims and the depth of harm he inflicted on them. Many of the
10 victims have reported significant fear of defendant based on his
11 crimes. A lengthy sentence is also necessary to promote respect for
12 the law and for specific deterrence. Defendant has had repeated
13 contact with law enforcement and demonstrates little regard for
14 others, especially women. In addition, defendant's punishment
15 should be severe enough not only to serve as a deterrent for him,
16 but also to other hackers who contemplate such activities.

17 **C. 18 U.S.C. § 3553(a)(6)**

18 18 U.S.C. § 3553(a)(6) requires the Court to minimize
19 sentencing disparity among similarly situated defendants. While
20 normally a Guidelines sentence helps to prevent sentencing
21 disparities, here it would create one. As explained above, the
22 applicable Guidelines simply do not capture the seriousness and
23 depth of defendant's conduct, and the Guidelines themselves template
24 this exact scenario and recommend an upward departure. This is
25 further evidenced by the above-Guidelines sentences that have been
26 repeatedly given to similarly-situated defendants.

27 In United States v. Mijangos, 10-743-GHK, defendant was a 32
28 year-old paraplegic who infected the computers of victims by sending

1 messages embedded with malicious software that gave him control over
2 victims' computers. He used that access to steal financial
3 information, to obtain access into their accounts and to turn on
4 their webcams. He also used images of his victims to sextort them
5 into providing more images. Mijangos was sentenced by this Court to
6 72 months' imprisonment, which was an above-Guideline sentence.
7 Mijangos had many similarities to defendant in terms of accessing
8 accounts, and extorting victims. While he used more technical means
9 to access the accounts (malware instead of social engineering), and
10 broadened his attack to include financial information, he also had
11 significant medical issues, did not have the same large number of
12 victims that defendant did, nor did he post the pictures publicly
13 with anywhere near the same frequency that defendant did.

14 In United States v. Chaney, 11-958-SJO, Chaney was sentenced to
15 120 months' imprisonment after being convicted of unauthorized
16 access and wiretapping. Chaney accessed the accounts of numerous
17 celebrities using similar methods to defendant: knowing or guessing
18 the usernames, and then knowing or guessing the password reset
19 answers. After Chaney accessed the accounts, he searched for and
20 obtained pictures of the celebrities. He made no threats to his
21 victims. Chaney distributed a small amount of the pictures, but
22 never posted them to the Internet himself.

23 In United States v. Finkbiner, 12-21-WTL (S.D. Ind.), a
24 district court case in Indiana, the defendant was recently sentenced
25 to 40 years in prison after tricking teens into providing sexual
26 images and then extorting more from them. Finkbiner, who had no
27 criminal history, had approximately 153 victims, and had captured
28 more than 11,000 video files with sexual conduct.

1
2 In United States v. Feigin, 2010 WL 376278, at **1 (11th Cir.
3 2010) (per curiam) (unpublished), Feigin was convicted for
4 installing malware on the computer of a single adult female victim,
5 which allowed him to capture nude images of the victim through her
6 webcam. There was no further extortion. The victim reported a
7 lasting impact from the crime, including insomnia, paranoia,
8 anxiety, and issues with trust and insecurity. Id. The district
9 court imposed a sentence nearly two times greater than the high end
10 of the advisory Guidelines range. Id. at **6. This 30 month
11 sentence was upheld by the Eleventh Circuit in an unpublished
12 opinion which recognized that the financial focus of U.S.S.G. §
13 2B1.1 failed to capture the deliberate invasion of privacy and
14 lasting the harm to the victim. Id. at **7-8. Notably, defendant's
15 conduct in this case is significantly worse, as it involved hundreds
16 of victims, some images of juveniles, and sextortion and threats to
17 the victims.

18 United States v. Barrett, CR 09-115-R, cited by defendant, does
19 not support a lower sentence. In that case, the defendant was
20 convicted of stalking one victim (who was famous) and using a camera
21 to videotape her through hotel peep holes. Barrett then uploaded
22 the images of that victim onto the Internet and tried to sell them
23 to a news organization. Law enforcement later discovered that
24 Barrett had also uploaded approximately 15 or 16 more videos of
25 unknown women on to the Internet. Barrett never contacted his
26 victims directly, nor interacted with them, nor forced them to do
27 anything. He was sentenced to 30 (not 27) months' imprisonment. In
28 contrast, defendant has over 370 known victims, and he committed his

1 crime by contacting them directly, and terrorizing them. Over 1,100
2 naked or semi-naked pictures were found on his computer.

3 Defendant's case is significantly worse in terms of both quantity
4 and quality, and deserves a much greater sentence.

5 In sum, courts have repeatedly recognized that the type of
6 crime for which defendant has been convicted warrants a greater
7 sentence than that called for by the Guidelines. In order to
8 minimize sentencing disparity among similarly situated defendants,
9 an above-guideline sentence is appropriate in this case as well.
10 Given defendant's extensive victimization, repeated extortion and
11 threats, and other aspects of his offense, a 72 month sentence is
12 appropriate and not greater than necessary.

13 **V. CONCLUSION**

14 For the foregoing reasons, the government requests that the
15 Court impose a sentence of 72 months' imprisonment, followed by a
16 three year period of supervised release.

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EXHIBIT I

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THE HONORABLE GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE

REPORTER'S TRANSCRIPT OF SENTENCING PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, DECEMBER 9, 2013; A.M. SESSION

PAGES 1 THROUGH 73, INCLUSIVE

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I N D E X

	PROCEEDINGS	PAGE
4	CASE IS CALLED	4
5	COURT'S COLLOQUY WITH PARTIES AND DEFENDANT	5
6	DEFENSE ARGUMENT	10
7	GOVERNMENT'S ARGUMENT	25
8	DEFENSE OBJECTION TO PUBLISHING VICTIM STATEMENTS	36
9	OBJECTION OVERRULED	36
10	VICTIM STATEMENT PUBLISHED	37
11	DEFENSE FURTHER ARGUMENT	39
12	GOVERNMENT'S FURTHER ARGUMENT	48
13	COURT BEGINS TO PRONOUNCE SENTENCE	49
14	RULINGS AS TO OBJECTIONS	50
15	CUSTODY, SUPERVISED RELEASE TERMS	59
16	GOVERNMENT MOTION TO DISMISS REMAINING COUNTS GRANTED	66
17	COURT ADVISES DEFENDANT OF RIGHT TO APPEAL	66
18	DEFENSE REQUESTS AND RECOMMENDATIONS	67
19	GOVERNMENT'S MOTION FOR REMAND	68
20	ARGUMENT	68
21	COURT ORDERS REMAND, DENYING SELF-SURRENDER REQUEST	72
22		
23		
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LOS ANGELES, CALIFORNIA; MONDAY, DECEMBER 9, 2013

9:40 A.M.

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4 **THE CLERK:** PLEASE REMAIN SEATED AND COME TO
5 ORDER. THIS UNITED STATES DISTRICT COURT IS IN SESSION.
6 THE HONORABLE GEORGE H. KING, CHIEF DISTRICT JUDGE,
7 PRESIDING.

8 CALLING ITEM NUMBER ONE ON THE COURT'S CALENDAR,
9 CRIMINAL 13-56, UNITED STATES OF AMERICA VERSUS KAREN
10 KAZARYAN, ALSO KNOWN AS GARY KAZARYAN.

11 COUNSEL, WOULD YOU PLEASE STATE YOUR APPEARANCES
12 FOR THE RECORD.

13 MS. WILKINSON: GOOD MORNING, YOUR HONOR.
14 TRACY WILKINSON ON BEHALF OF THE UNITED STATES. WI
15 AT COUNSEL TABLE IS F.B.I. SPECIAL AGENT
16 JEFFREY KIRKPATRICK.

17 THE COURT: YES, GOOD MORNING.

18 **MR. KESSEL:** YOUR HONOR, GOOD MORNING. ATTORNEY
19 ALEX KESSEL. I'M WITH MY CLIENT, WHO IS PRESENTLY AT THE
20 COUNSEL TABLE, YOUR HONOR.

21 **THE COURT:** ALL RIGHT. WHY DON'T YOU AND YOUR
22 CLIENT APPROACH THE LECTERN FOR SENTENCING.

23 THIS MATTER'S ON THE COURT'S CALENDAR FOR
24 CONSIDERATION OF THE PRESENTENCE REPORT AND FOR IMPOSITION
25 OF SENTENCE.

1 ANY LEGAL CAUSE WHY SENTENCE SHOULD NOT NOW BE
2 PRONOUNCED, MR. KESSEL?

3 **MR. KESSEL:** NO, YOUR HONOR.

4 **THE COURT:** IS KAREN KAZARYAN YOUR TRUE NAME?

5 **THE DEFENDANT:** YES, YOUR HONOR.

6 **THE COURT:** MR. KAZARYAN, HAVE YOU HAD AN
7 OPPORTUNITY TO REVIEW THE PRESENTENCE REPORT AND
8 RECOMMENDATIONS MADE BY THE PROBATION OFFICER AS WELL AS
9 THE POSITION PAPERS OF THE PARTIES RE SENTENCING?

10 **THE DEFENDANT:** I HAVE, YOUR HONOR.

11 **THE COURT:** AND HAVE YOU HAD AN OPPORTUNITY TO
12 REVIEW ALL OF THOSE MATTERS WITH YOUR LAWYER?

13 **THE DEFENDANT:** YES, YOUR HONOR.

14 **THE COURT:** AND ARE YOU READY TO PROCEED WITH
15 SENTENCING AT THIS TIME?

16 **THE DEFENDANT:** I AM, YOUR HONOR.

17 **THE COURT:** MR. KESSEL, I ASSUME, OF COURSE, YOU
18 HAVE REVIEWED ALL OF THE SENTENCING PAPERS WHETHER FILED
19 BY THE PROBATION OFFICER OR THE PARTIES?

20 **MR. KESSEL:** YES, I HAVE, ON NUMEROUS OCCASIONS,
21 YOUR HONOR.

22 **THE COURT:** AND HAVE YOU HAD AN ADEQUATE
23 OPPORTUNITY TO REVIEW ALL OF THEM WITH YOUR CLIENT?

24 **MR. KESSEL:** I HAVE, YOUR HONOR.

25 **THE COURT:** AND TO THE EXTENT THAT HE MAY HAVE

1 HAD ANY ADDITIONS, MODIFICATIONS, OR OBJECTIONS, YOU WOULD
2 HAVE REFLECTED THOSE IN YOUR OWN VARIOUS POSITION PAPERS?

3 **MR. KESSEL:** YES, YOUR HONOR.

4 AND MAY I JUST NOTE FOR THE RECORD, I'M ASSUMING
5 THAT THE COURT HAS -- I HAD AN INITIAL SENTENCING
6 MEMORANDUM THAT WAS SUBMITTED TO THE COURT. I THEREAFTER
7 SUBMITTED WHAT I DEEMED ENTITLED "REPLY TO THE
8 GOVERNMENT'S OPPOSITION," AND THEN MY MOST RECENT
9 SUBMISSION, YOUR HONOR, WAS A SUPPLEMENTAL REPLY.

10 **THE COURT:** I HAVE ALL THREE.

11 **MR. KESSEL:** THANK YOU.

12 **THE COURT:** AND I HAVE CONSIDERED ALL THREE.

13 DO YOU HAVE ANY OBJECTION TO THE PROBATION
14 OFFICER'S SUGGESTION OF A THREE-YEAR TERM OF SUPERVISED
15 RELEASE?

16 **MR. KESSEL:** AS TO THAT, NO, YOUR HONOR.

17 **THE COURT:** DO YOU HAVE ANY OBJECTION TO THE
18 PROBATION OFFICER'S VARIOUS SUGGESTED TERMS OF
19 SUPERVISION? AND THERE ARE, I BELIEVE, 17 OF THEM.

20 **MR. KESSEL:** NO, YOUR HONOR.

21 **THE COURT:** I HAVE FULLY CONSIDERED YOUR
22 POSITION.

23 LET ME JUST SUMMARIZE FOR YOU, AND THEN I'LL
24 GIVE YOU AN OPPORTUNITY TO GO AHEAD AND BE HEARD ON BEHALF
25 OF YOUR CLIENT, AND OF COURSE, I'LL GIVE YOUR CLIENT AN

1 OPPORTUNITY TO BE HEARD AS WELL.

2 FIRST, YOU HAVE CERTAIN OBJECTIONS TO THE
3 PRESENTENCE REPORT. YOU OBJECT TO THE SIX-LEVEL INCREASE
4 UNDER THE GUIDELINE CALCULATION FOR MORE THAN 250 VICTIMS.
5 YOU OBJECT TO THE TWO-LEVEL INCREASE FOR SOPHISTICATED
6 MEANS.

7 YOU AGREE THAT THE CRIMINAL HISTORY CATEGORY
8 SHOULD BE 1, BUT YOU ALSO ARGUE THAT AT PARAGRAPH 104 --
9 WHICH REFERS TO THE PRIOR ARREST BUT NO CONVICTION IN THAT
10 CASE -- YOUR VIEW IS THAT IT WAS NOT DISMISSED DUE TO
11 FAILURE OF THE D.A. TO BRING THE CASE TO TRIAL IN A TIMELY
12 MANNER, BUT THAT THERE WAS SOMETHING HAVING TO DO WITH THE
13 CREDIBILITY OF THE VICTIM, AT LEAST SO YOU SAY.

14 YOU ALSO HAVE VARIOUS ARGUMENTS UNDER 3553(A),
15 INCLUDING EARLY ACCEPTANCE OF RESPONSIBILITY, NO EGREGIOUS
16 PHOTOS, NO GENERAL PUBLIC DISSEMINATION, NO CHILDREN
17 INVOLVED.

18 THIS WAS, ACCORDING TO YOU, AT MOST AN ILLEGAL
19 ACCESS THAT DID NOT INVOLVE ACTUAL PHYSICAL CONTACT WITH
20 ANOTHER PERSON, THAT YOUR CLIENT WAS AT A YOUNG AGE, THAT
21 HE'S MORE OF A VOYEUR THAN A PREDATOR, THAT THE
22 PSYCHOLOGICAL REPORT CONFIRMED NO SEXUAL DYSFUNCTION
23 PROBLEMS LEADING TO DANGERS OF FURTHER MISCONDUCT.

24 HE DOES HAVE EDUCATION. HE HAS SKILLS FOR A
25 CAREER. HE HAD PRIOR EMPLOYMENT AND HAS SUPPORTIVE

1 FAMILY. HE HAS COMPLIED WITH THE TERMS OF PRETRIAL
2 SUPERVISION AS WELL AS HOME DETENTION. HE HAS ALSO
3 COMMUNITY SUPPORT.

4 HE HAS SUFFERED PUBLIC HUMILIATION THROUGH THE
5 NEWS COVERAGE, AND YOU COMPARE HIM WITH THE CASE OF
6 UNITED STATES VERSUS BARRETT, WHERE YOU ASSERT THAT THERE
7 WAS ONLY A 27-MONTH SENTENCE IN THAT CASE.

8 YOUR VIEW, ULTIMATELY, IS THAT IT SHOULD BE A
9 TOTAL SENTENCE OF 30 MONTHS -- 6 MONTHS ON COUNT 12 AND
10 THE REQUIRED 24 MONTHS MANDATORY MINIMUM CONSECUTIVE
11 SENTENCE ON COUNT 27.

12 DOES THAT ADEQUATELY SUMMARIZE YOUR INITIAL
13 PAPERS?

14 **MR. KESSEL:** YES, IT DOES, YOUR HONOR.

15 **THE COURT:** YOU ALSO HAVE FILED A REPLY, AS YOU
16 SAY, AND A SUPPLEMENTAL REPLY.

17 IN YOUR REPLY, YOU ARGUE THAT THE GOVERNMENT'S
18 EFFECTIVE UPWARD REQUEST OF 30 MONTHS IS UNWARRANTED, THAT
19 ANY AGGRAVATING CIRCUMSTANCES HAVE ALREADY BEEN
20 SUFFICIENTLY ACCOUNTED FOR IN THE GUIDELINES.

21 THE LEVEL OF PSYCHOLOGICAL INJURY IN THIS CASE,
22 IN YOUR VIEW, IS INSUFFICIENT TO WARRANT AN UPWARD
23 DEPARTURE UNDER THE PROVISIONS OF THE GUIDELINES; THAT THE
24 GOVERNMENT'S REFERENCE TO THIS AS "RAPE" OR "SEXTORTION"
25 IS HYPERBOLE BECAUSE, IN YOUR VIEW, NEITHER OF THOSE

1 DEFINITIONS HAVE BEEN MET.

2 YOU CRITICIZE THE GOVERNMENT FOR ATTEMPTING TO
3 MINIMIZE THE DEFENDANT'S BACKGROUND AND CHARACTER, AND
4 THAT YOU SUPPORT DR. MARKMAN'S POSITION.

5 DOES THAT ADEQUATELY SUMMARIZE YOUR INITIAL
6 REPLY?

7 **MR. KESSEL:** IT DOES, YOUR HONOR. THANK YOU.

8 **THE COURT:** AND FINALLY, IN YOUR SUPPLEMENTAL
9 REPLY, YOU ARGUE THAT UPWARD DEPARTURES ARE RARE EVENTS IN
10 FEDERAL SENTENCING, AND YOU ALSO MADE VARIOUS DISTINCTIONS
11 BETWEEN THIS CASE AND THE CASE OF UNITED STATES VERSUS
12 MIJANGOS, WHICH THIS COURT HAS ALSO HANDLED, AND SENTENCED
13 THE DEFENDANT THERE TO 72 MONTHS IN CUSTODY.

14 YOU ARGUE THAT THE GOVERNMENT'S EXHIBITS THAT
15 THEY HAVE ATTACHED DO NOT WARRANT UPWARD DEPARTURE FROM
16 THE GUIDELINES OR VARIANCE FROM THE GUIDELINES, AND YOU
17 SUBMITTED DR. MARKMAN'S RESUMÉ TO SUPPORT THE BONA FIDES
18 OF HIS QUALIFICATIONS.

19 DOES THAT ADEQUATELY SUMMARIZE YOUR SUPPLEMENTAL
20 REPLY, MR. KESSEL?

21 **MR. KESSEL:** YES, IT DOES, YOUR HONOR. THANK
22 YOU.

23 **THE COURT:** ALL RIGHT. MR. KESSEL, YOU MAY BE
24 HEARD ON BEHALF OF YOUR CLIENT, THEN, AT THIS TIME.

25 **MR. KESSEL:** YOUR HONOR, THANK YOU.

DEFENSE ARGUMENT

2 AND I'M NOT GOING TO -- AS YOUR HONOR JUST
3 SUMMARIZED THIS, BUT I TOOK A LOT OF TIME AND EFFORT TO
4 TRY TO ARTICULATE IN MY WRITTEN SUBMISSIONS, YOUR HONOR,
5 OUR POSITION.

6 AND I PREFACE MY REMARKS NOW JUST TO AMPLIFY ON
7 SOME OF THOSE SUBMISSIONS, YOUR HONOR, THAT MY CLIENT HAS
8 TAKEN RESPONSIBILITY FOR HIS CONDUCT, WHICH NO DOUBT
9 INVOLVED SOME DEGREE -- AND, AGAIN, A DEGREE OF INVASION
10 OF PRIVACY, AND HE'S ACCEPTED THAT EARLY ON, YOUR HONOR.

11 I CAN TELL YOU THERE WAS NEVER EVEN A THOUGHT IN
12 MY CLIENT'S MIND, AFTER REVIEWING EVERYTHING AND SEEING
13 THE GOVERNMENT'S CASE, THAT HE WANTED TO GO TO TRIAL.

14 AND I MENTION THAT ONLY BECAUSE ONE OF THE
15 OTHER, I BELIEVE, MITIGATING CIRCUMSTANCES THAT WE'RE
16 ASKING YOUR HONOR TO CONSIDER IS IF THESE WOMEN -- AND I
17 WILL GET TO THAT -- HAVE SUFFERED SOME DEGREE, SOME
18 DEGREE -- I ARGUE IT DIDN'T AMOUNT TO THE DEGREE OF
19 PSYCHOLOGICAL DYSFUNCTION THAT'S SOMEWHAT ARTICULATED IN
20 THE GUIDELINES THAT HAS TO DO WITH SOME LONG-TERM
21 PSYCHOLOGICAL EFFECT, WHICH THE GOVERNMENT HASN'T
22 PRESENTED ANY EVIDENCE, THE ONE IMPACT LETTER.

23 BUT I HAVEN'T SEEN ANY MEDICAL OR PSYCHOLOGICAL
24 REPORTS THAT SUPPORT THAT ANY OF THESE AND I SAY "YOUNG
25 WOMEN" -- ALTHOUGH I'M NOT COUCHING THAT IN TERMS OF CHILD

1 PORNOGRAPHY. I'M TALKING ABOUT YOUNG ADULT WOMEN,
2 YOUR HONOR -- I DON'T BELIEVE HAVE THE DEGREE OF
3 PSYCHOLOGICAL DAMAGE THAT WARRANTS AN UPWARD DEPARTURE.

4 I DID REFERENCE, AND YOUR HONOR PROBABLY KNOWS
5 MORE SO THAN I, ABOUT THE TIMES IN WHICH UPWARD DEPARTURES
6 ARE GRANTED. AND IN MY MIND, IN MY 27 YEARS OF PRACTICE,
7 THEY ARE A RARITY, I SHOULD SAY. WHEN THE GUIDELINES,
8 WHICH HAS A RANGE ITSELF, A LOW TO A HIGH END, TAKES INTO
9 CONSIDERATION MANY, MANY FACTORS THAT THE COURT CAN
10 SENTENCE WITHIN THE GUIDELINES, TO GO 30 MONTHS ABOVE, AS
11 I INDICATED IN MY MOVING PAPERS, YOUR HONOR, I DON'T
12 BELIEVE IS WARRANTED IN THIS CASE.

13 THE OTHER THING I WANT TO MENTION, YOUR HONOR,
14 IS THE GOVERNMENT -- AND YOU USED THE WORD "HYPERBOLE,"
15 AND I'M NEVER, EVER MINIMIZING THE CONDUCT HERE. BUT I AM
16 BELIEVING THE GOVERNMENT HAS OVERSTATED THE HARM, IF YOU
17 WILL, IN THIS CASE. AND THEY USE CERTAIN WORDS, YOUR
18 HONOR, THAT THEY ATTRIBUTE --

19 AND I JUST WANT TO REEMPHASIZE THIS, YOUR HONOR,
20 REITERATE TO THE COURT. I DON'T KNOW ABOUT TAKING
21 OFFENSE, BUT I DON'T THINK MY CLIENT'S CONDUCT, YOUR
22 HONOR, CAN BE EVEN CLOSE TO ATTRIBUTING IT TO THE CRIME OF
23 RAPE AS I KNOW RAPE, PHYSICALLY ASSAULTING A WOMAN FOR A
24 SEXUAL ACT WITH VIOLENCE AGAINST HER PERSON, YOUR HONOR.

25 SO I DON'T EVEN THINK IT COMES CLOSE TO THAT,

1 AND THE GOVERNMENT HAS OFTEN USED IN SOME OF THESE CASES,
2 INCLUDING MY CLIENT'S CASE, THAT TYPE OF CONDUCT TO DEFINE
3 OR SUPPORT, IF YOU WILL, THEIR ARGUMENT FOR A STRICT
4 SENTENCE.

5 THE OTHER THING, YOUR HONOR -- WE REFERENCED
6 THIS DURING THE COLLOQUY WE HAD WITH THE COURT DURING THE
7 CHANGE-OF-PLEA PROCEEDINGS. THEY ALSO USE THE WORD
8 "EXTORTION" OR "SEXTORTION" OR EXTORTION IN THE SENSE
9 OF -- I DON'T KNOW IF YOUR HONOR KNOWS -- IN THE
10 UNITED STATES CRIMINAL CODE, THERE IS A DEFINITION OF
11 EXTORTION, AND IT'S UNDER 18 U.S.C., 3553(C)(2). IT HAS A
12 NUMBER OF SUBSTANTIVE CRIMES, AND IT LISTS AT LEAST THE
13 COMMON DEFINITION OF EXTORTION, WHICH YOUR HONOR KNOWS
14 WAS -- AND I JUST WANT TO ITERATE IT AS IT'S NOTED. IT'S
15 A VERY SHORT DEFINITION. IT'S (AS READ:)

16 *"EXTRACTION OF ANYTHING OF VALUE FROM ANOTHER
17 PERSON BY THREATENING OR PLACING THAT PERSON IN
18 THREAT OF BODILY HARM, FEAR, OR INJURY."*

19 *(END QUOTED MATERIAL.)*

20 **THE COURT:** AND I CAN TELL YOU UNQUESTIONABLY
21 WITHOUT ANY HESITATION THAT THE CONDUCT HERE, ALBEIT
22 INVASIVE, YOUR HONOR, IN NO WAY COMPORTS WITH IN MY
23 ASSESSMENT, YOUR HONOR, THE EXTORTION AS WE KNOW IT IN
24 DEFINITION OR PRACTICALLY, YOUR HONOR.

25 AND I WOULD ASK YOUR HONOR -- BECAUSE, AGAIN,

1 THE GOVERNMENT USES THAT TERM, TO SOMEHOW -- AND I THINK
2 IT HAS A DEFINITIVE LEGAL MEANING THAT IMPORTS IN THAT
3 MEANING SOME DEGREE OF PHYSICAL THREAT OF VIOLENCE OR
4 INJURY AGAINST A PERSON, AND THAT'S WHY IT'S EGREGIOUS
5 CONDUCT, AND THAT'S WHY IT'S TREATED DIFFERENTLY.

6 THAT'S NOT WHAT HAPPENED HERE. EVEN IN THE
7 HUNDREDS OR THOUSANDS OF MESSAGES HERE, THERE WAS NEVER AN
8 ATTEMPT BY THE CLIENT TO RENDER ANYBODY IN FEAR THAT THEY
9 WOULD SUFFER VIOLENCE OR GREAT BODILY INJURY.

10 THAT DOVETAILS INTO WHAT HAPPENED HERE. THE
11 GOVERNMENT, IN ITS SUBMISSION, YOUR HONOR, SUBMITTED I
12 ASSUME THEIR MOST TELLING -- IF I CAN USE THAT WORD --
13 EVIDENCE OF COMPUTER MESSAGES THAT WERE SENT EITHER BY MY
14 CLIENT ACTING AS ANOTHER PERSON OR, AS YOU CAN SEE, YOUR
15 HONOR, MANY OF THESE YOUNG WOMEN LEARNED THAT MY CLIENT
16 WAS NOT THEIR RELATIVE OR THEIR FRIEND.

17 AND THE ONE THING I WANT TO ITERATE TO THE
18 COURT, AND IT'S PERVERSIVE IN THE GOVERNMENT'S
19 SUBMISSIONS -- EXHIBITS C, D, AND E, MORE SPECIFICALLY OF
20 THEIR OPPOSITION -- IS THAT -- AND AGAIN, I'M PREFACING
21 THAT MY CLIENT SHOULDN'T HAVE BEEN CONTACTING, YOUR HONOR;
22 MY CLIENT SHOULDN'T HAVE BEEN OPERATING IN THE MEANS AND
23 MANNER IN WHICH HE DID. NO QUESTION ABOUT THAT, AND I
24 NEVER WANT MY ARGUMENTS TO UNDERMINE AT ALL HIS
25 RESPONSIBILITY.

1 I'M JUST TRYING TO SHOW, YOUR HONOR -- BECAUSE A
2 LOT OF THE GOVERNMENT'S SUPPORT FOR THE 30-MONTH DEPARTURE
3 IS BASED ON THE OUTRAGEOUS CONDUCT. WHAT I SAW IN THESE
4 EXHIBITS, MOST OF MY CLIENT'S CONDUCT, YOUR HONOR -- AND
5 THAT HAD TO DO WITH OUR ARGUMENT THAT THERE WASN'T 250
6 VICTIMS. I DON'T KNOW HOW THE COURT IS GOING TO LOOK AT
7 THAT.

8 THERE IS A FINE LINE. IF YOU LOG IN ON
9 SOMEBODY'S COMPUTER NETWORK AND YOU USE THEIR PASSWORD, I
10 GUESS THE COURT COULD FIND -- AND EVEN THOUGH YOU DON'T
11 CONTACT THEM AND YOU DON'T USE IT IN A MANNER THAT THE
12 CRIME WAS DONE HERE, WHERE YOU ARE CONTACTING PEOPLE AND
13 HAVING SOME DIALOGUE WITH THEM, BUT IT IS SIMPLY A LOG-IN,
14 WHICH 90 PERCENT OF THE CONTACTS WERE THAT TYPE.

15 THERE IS A REFERENCE ABOUT A PERSON'S MEANS OF
16 IDENTITY, WHICH CLEARLY I WOULD SUBMIT COULD BE A COMPUTER
17 NAME OR LOG-IN NUMBER, IF YOU WILL. THEN IF HE USED IT IN
18 THAT SENSE, I WOULD SUBMIT IT.

19 BUT I'M JUST TRYING TO SHOW YOUR HONOR THAT
20 UNLIKE THE GUY WHO TAKES A CREDIT CARD AND USES THOSE
21 NUMBERS IN A TRANSACTION, YOUR HONOR -- THAT HAPPENED LESS
22 THAN FIVE TIMES IN THIS CASE, YOUR HONOR -- AND THAT'S WHY
23 I HAD ARGUED, YOUR HONOR, WHETHER OR NOT THERE WAS A
24 SIX-LEVEL ADDITION, WHICH IS SUBSTANTIAL, FOR THE NUMBER
25 OF VICTIMS.

1 THE OTHER THING THAT I ARGUED, YOUR HONOR, WAS
2 THAT THE GOVERNMENT IS SAYING THIS CASE DEMANDS MORE TIME
3 BECAUSE THE GUIDELINES, IN THE WISDOM OF THE GUIDELINES,
4 DOESN'T CAPTURE -- THAT'S THE TERM I USE -- THE CONDUCT
5 HERE. AND I SAY TO THAT -- I DON'T AGREE WITH THAT; I
6 HOPE YOUR HONOR DOESN'T AGREE TO IT.

7 AND I WANT TO POINT TWO THINGS IN THAT
8 DIRECTION. FIRST AND FOREMOST, YOUR HONOR, BESIDE
9 PLEADING TO THE COMPUTER ACCESS TO GAIN PERSONAL
10 INFORMATION, WHICH IS THE 1030 CHARGE, MY CLIENT ALSO
11 PLEAD TO A 1028A.

12 NOW, THAT, I THINK, ALSO CAPTURES -- THAT'S A
13 MANDATORY MINIMUM OF TWO YEARS. THAT, IN A NUTSHELL,
14 DOVETAILS WITH THE SUBSTANTIVE CRIME, AND I'VE ALWAYS
15 TRIED TO DISCERN WHAT CONGRESS'S INTENT WAS. BESIDES
16 PUNISHING YOU FOR THE SUBSTANTIVE CRIME, WE HAVE THIS
17 CRIME CALLED AGGRAVATED IDENTITY, AND I SEE WHY. IT'S ONE
18 THING TO PILFER A MEANS OF IDENTITY. THAT'S A CRIME IN
19 AND OF ITSELF. BUT THEN, IF YOU USE IT IN CONJUNCTION
20 WITH ONE OF THE CRIMES ARTICULATED -- A BANK FRAUD, A
21 COMPUTER FRAUD -- THEY WANT PUNISHMENT, AND I AGREE WITH
22 THAT.

23 THAT'S WHAT HAPPENED HERE. HE NOT ONLY FOUND
24 AND ACCESSED COMPUTER INFORMATION -- AND I'M USING A
25 SHORTHAND VERSION FOR EMAILS, WHAT-HAVE-YOU -- HE NOT ONLY

1 PILFERED THAT. AND I'M USING THAT WORD "PILFER" IN THE
2 SENSE OF ILLEGALLY OBTAINING IT -- BUT HE USED IT. AND I
3 SAY HE USED IT ON THE FEW OCCASIONS THAT THERE WAS THIS
4 DIALOGUE BETWEEN HIM AND THESE VICTIMS, YOUR HONOR.

5 SO WHEN THE GOVERNMENT TRIES TO HAVE YOU LOOK AT
6 THE LOSS AND THE MONETARY LOSS TABLE TO TRY TO ANALOGIZE,
7 I DON'T THINK THAT'S FAIR BECAUSE I BELIEVE THAT THE
8 CONDUCT HAS BEEN CAPTURED RIGHTFULLY BY VIRTUE OF THE 1030
9 PLEA, BY VIRTUE OF MY CLIENT'S ADMISSION AND PLEA TO ONE
10 COUNT OF AGGRAVATED IDENTITY THEFT.

11 THE OTHER THING THAT I WANT, YOUR HONOR, TO
12 INDICATE -- CONGRESS HAS CONTEMPLATED IN THE ADJUSTMENTS
13 FOR THIS KIND OF CRIME A SPECIFIC ADJUSTMENT. I WOULD
14 ALERT YOUR HONOR, SOMETHING THAT MY CLIENT AGREED TO IN
15 THE PLEA AGREEMENT AND I THINK IS APPLICABLE HERE,
16 2B1. -(B)16(A).

17 THAT'S SPECIFICALLY, IF YOU LOOK AT THAT, THAT
18 SAYS IN A 1030 CASE WHERE A DEFENDANT HAS INVADED, HACKED,
19 IF YOU WILL, INTO A PERSONAL COMPUTER OF ANOTHER AND ALSO
20 HAS USED THE INFORMATION.

21 AND 2B1. -(B)16(A) ALSO HAS AS AN ALTERNATIVE IF
22 THAT COMPUTER INFORMATION, WHATEVER'S BEEN GAINED FROM
23 THAT PILFERING, YOUR HONOR, HAS RESULTED IN SOME TYPE OF
24 DISSEMINATION, THAT'S ALL UNDER THAT ADJUSTMENT, YOUR
25 HONOR.

1 AND THAT'S EXACTLY WHEN THE GOVERNMENT IS
2 IMPLORING YOUR HONOR TO GO ABOVE AND BEYOND THE
3 GUIDELINES.

4 THEY ASK YOU TO LOOK AT THE FACT THAT EVEN IF IT
5 WAS DONE IN THE VICTIM'S OWN COMPUTER NETWORK VERSUS OVER
6 THE INTERNET -- AND I'LL GET TO THAT IN A MINUTE WHEN I
7 TALK ABOUT THAT ONE CASE THAT YOU SENTENCED SOMEBODY FOR
8 SIMILAR CONDUCT. MY CLIENT NEVER PUBLICLY DISSEMINATED
9 ANY OF THIS INFORMATION, YOUR HONOR, AND THAT'S CRITICAL.

10 SO I TRULY BELIEVE, YOUR HONOR, THAT THE
11 GUIDELINES AND THE MEASURE OF THE CONDUCT UNDER THE
12 GUIDELINES IN THIS CASE, WITH THE CAVEAT ALSO THAT MY
13 CLIENT ALSO PLED GUILTY TO THE 1028, YOUR HONOR, IS MORE
14 THAN SUFFICIENT TO CAPTURE THE CONDUCT INVOLVED IN THIS
15 CASE AND THAT A DEPARTURE VIA THE MECHANISM OF SOME
16 TORTURING OF THE MONETARY LOSS TABLE TO TRY TO GET YOUR
17 HONOR TO SEE THAT IT'S SOMEHOW AKIN TO THAT, WITH ALL DUE
18 RESPECT, I DON'T BELIEVE IS LEGALLY CORRECT, NOR IS IT
19 PRACTICAL IN THE SENTENCING ASPECT OF THIS CASE,
20 YOUR HONOR.

21 WITH RESPECT TO DISPARITY, YOUR HONOR, I TRIED
22 TO FIND A CASE. IT'S ONE THING JUST TO PICK OUT ANY CASE.
23 AND THE ONE THING THAT -- I USED THE BARRETT CASE BECAUSE
24 THE GOVERNMENT, KINDLY, WHEN I MET WITH THEM, THEY GAVE ME
25 A NUMBER OF THESE CASES, AND I SAY "THESE CASES" THAT HAVE

1 THIS TYPICAL TYPE OF HACKING WHERE THERE'S BEEN CONTACT
2 WITH A COMPUTER USER AND THERE'S BEEN SOME SEXUAL
3 OVERTONES, MESSAGES, IF YOU WILL.

4 SO I TRIED TO GET THE UNIVERSE OF THOSE TYPE OF
5 CASES FOR YOUR HONOR TO LOOK AT. THE ONE I FOUND -- I
6 DON'T WANT TO SAY SIMILAR, BUT THE SAME TYPE OF CONDUCT
7 WAS THE CASE THAT YOUR HONOR SENTENCED, MIJANGOS -- AND I
8 MAY BE MISPRONOUNCING IT -- BUT YOUR HONOR WAS THE
9 SENTENCING JUDGE.

10 AND I HOPE, YOUR HONOR, THAT IN MY MOST RECENT
11 SUBMISSION I WENT THROUGH WHAT I BELIEVE APPROPRIATELY MAY
12 HAVE JUSTIFIED A 72-MONTH SENTENCE, AND I SAY THAT BECAUSE
13 THAT'S WHAT THE GOVERNMENT IS ASKING FOR IN THIS CASE.

14 OUR PLEA AGREEMENT, YOUR HONOR, HAD A MAXIMUM
15 LIMIT THAT THE GOVERNMENT COULD ASK FOR, WHICH WAS
16 72 MONTHS, AND THEY ARE ASKING FOR THAT. I DON'T THINK
17 THEY ARE VIOLATING THE PLEA AGREEMENT. I'M JUST SIMPLY
18 INDICATING TO YOU THAT I DON'T BELIEVE THEIR REQUEST FOR
19 THE MAXIMUM UNDER THE PLEA AGREEMENT IS WARRANTED.

20 AND I TRIED TO BRING UP THE CASE YOUR HONOR
21 USED. IF YOU MAY REMEMBER OR NOT REMEMBER, JUST A COUPLE
22 THINGS, BECAUSE DISPARITIES OF SENTENCES ARE A 3553
23 FACTOR.

24 I KNOW IT'S IMPORTANT YOUR HONOR TRY TO BE AS
25 FAIR AS POSSIBLE TO SIMILARLY SITUATED PEOPLE, AND I

1 WANTED YOU TO KNOW THAT I DON'T THINK MIJANGOS, EVEN
2 THOUGH IT WAS THE SAME CONDUCT, A COUPLE OF THINGS
3 DIFFERED.

4 ONE, OVER HUNDREDS OF VICTIMS THAT WERE ACTUALLY
5 CONNECTED WITH AND COMMUNICATED WITH, YOUR HONOR.
6 WIRETAPPING, HE PLEAD TO. BECAUSE WHAT HE DID IS HE PUT
7 ON THIS MAL-WARE, WHICH IS A SHORTHAND TERM FOR A NUMBER
8 OF COMPUTER VIRUSES THAT ALLOW THE INFECTOR, IF YOU WILL,
9 TO MONITOR A PERSON'S COMPUTER, TO DISENGAGE THE ABILITY
10 TO CHANGE AN ACCOUNT OR ALLOW SOMEBODY, IF THEY FEEL THEY
11 HAVE BEEN INVADED, TO CHANGE AN EMAIL ACCOUNT. THAT'S THE
12 TYPE OF INFECTIOUS DEVICES THAT ARE OUT THERE. THAT'S
13 WHAT MIJANGOS PUT ON AT THE TIME, YOUR HONOR, HIS VICTIMS.

14 NOTHING WAS DONE HERE IN THAT REGARD. THERE WAS
15 NEVER AN ATTEMPT BY MY CLIENT TO DISRUPT THE COMPUTER OF
16 THE VICTIM TO THE POINT WHERE HE WOULD INFECT THE
17 COMPUTER, ALLOWING HIM TO TOTALLY CONTROL ITS FUNCTIONS.

18 THE OTHER THING IN THAT CASE, YOUR HONOR, THERE
19 WAS CHILD PORNOGRAPHY ON THAT MAN'S COMPUTER, CLEAR CHILD
20 PORNOGRAPHY.

21 THE OTHER THING THAT I THOUGHT WAS INDICATIVE OF
22 AN AGGRAVATING CIRCUMSTANCE IS THE DEFENDANT IN THAT CASE
23 NOT ONLY STOLE INFORMATION, PICTURES, COMMUNICATED,
24 THREATENED TO SEND IT TO THE VICTIM'S FAMILY, COWORKERS
25 AND DID ON OCCASION SEND IT TO ONE OF THE VICTIM'S

1 COWORKERS. NONE OF THAT HAPPENED HERE.

2 AND MORE IMPORTANTLY, THE DEFENDANT IN THAT
3 CASE, YOUR HONOR, USED ALSO FINANCIAL INFORMATION THAT WAS
4 GLEANED FROM HIS COMPUTER HACKING AND DID FRAUDULENT
5 FINANCIAL TRANSACTIONS USING THE VICTIM'S CREDIT
6 INFORMATION, SOCIAL SECURITY AND BANKING INFORMATION, TO
7 DO VARIOUS FRAUDULENT BANKING AND FINANCIAL TRANSACTIONS,
8 YOUR HONOR. NONE OF THAT EVER, EVER OCCURRED IN THIS
9 CASE.

10 SO I'M TRYING TO GIVE THE COURT AT LEAST AN IDEA
11 WHY THE GOVERNMENT'S SUBMISSIONS AND THE HYPERBOLE, IF I
12 CAN USE THAT -- AND I THINK YOUR HONOR WAS DEFINING WHAT I
13 WAS TRYING TO GET ACROSS TO THE COURT -- AND I WOULD
14 AGREE, IT IS HYPERBOLE IN MANY SENSES.

15 BUT WHAT'S MORE IMPORTANT IS WHAT IS AN
16 APPROPRIATE SENTENCE IN THIS CASE?

17 MY CLIENT DOESN'T HAVE ANY RECORD. AND I KNOW
18 THAT'S ANOTHER, I DON'T WANT TO SAY, CONTENTION IN THE
19 SENSE OF THE PRIOR CHARGE AT STATE LEVEL, YOUR HONOR. I
20 DON'T KNOW, NOT KNOWING YOUR HONOR'S THOUGHT PROCESS ON
21 THAT, HOW AND FOR WHAT PURPOSE YOUR HONOR IS USING THAT.

22 I'M ASKING YOU TO GIVE IT VERY LITTLE WEIGHT,
23 YOUR HONOR, FOR THE FOLLOWING REASONS:

24 ONE, IT DIDN'T ARISE TO A CONVICTION. AND THE
25 GUIDELINES, ALTHOUGH IT ALLOWS THE COURT TO LOOK AT A

1 NUMBER OF THINGS, BUT EVEN FOR CRIMINAL HISTORY THERE'S
2 NOTES IN THERE THAT TALK ABOUT ARRESTS THAT DON'T AMOUNT
3 TO CONVICTIONS SHOULD BE LOOKED AT CAREFULLY AS TO VERSUS
4 A CONVICTION WHERE YOU AT LEAST HAVE SOME DEGREE OF
5 CERTAINTY VIA A PLEA AGREEMENT, A DEFENDANT ADMITTING HIS
6 GUILT, OR A JURY WHERE ALL THE PANOPLY OF RIGHTS ARE
7 AFFORDED AND THE JURY HAS FOUND BEYOND A REASONABLE DOUBT,
8 BY UNANIMOUS VERDICT, THAT A PERSON IS GUILTY, YOUR HONOR.

9 AND I APPRECIATE EVEN THERE'S NINTH CIRCUIT LAW
10 AND MAYBE U.S. SUPREME COURT LAW THAT SAYS THAT EVEN
11 ACQUITTED CONDUCT MAY BE EVEN USED FOR SENTENCING.

12 BUT MY CONCERN IN THIS CASE, YOUR HONOR -- AND I
13 SPEAK FROM FIRST PERSON IN THIS SENSE: I WAS
14 MR. KAZARYAN'S ATTORNEY OF RECORD IN THAT STATE CASE,
15 YOUR HONOR. AND I CAN SAY AS AN OFFICER OF THE COURT TO
16 YOUR HONOR THAT I KNEW THAT CASE VERY WELL. I KNEW IT
17 MORE THAN JUST COMING IN ON THIS CASE AND PICKING UP SOME
18 DOCUMENTS. I INTERVIEWED WITNESSES. I SENT OUT
19 INVESTIGATORS TO FIND OUT THE BACKGROUND OF THIS YOUNG
20 LADY.

21 IN STATE COURT, THE PEOPLE COME IN ON THE DAY OF
22 TRIAL. MY CLIENT DIDN'T WANT TO TAKE THE PLEA AGREEMENT,
23 NOR DID THE OTHER TWO CO-DEFENDANTS. WE WANTED TO GO TO
24 TRIAL AND TEST THE ALLEGATIONS. AND WHAT WE WERE TOLD WAS
25 AFTER SUBMITTING ALL OUR DISCOVERY TO THE GOVERNMENT AND

1 SHOWING ALL OUR INTERVIEWS OF WITNESSES TO SHOW HOW
2 UNRELIABLE, IF YOU WILL, THE VICTIM WAS, THE PEOPLE CAME
3 IN, AND THEY TOLD THE JUDGE ON THE DAY OF TRIAL THEY ARE
4 UNABLE TO PROCEED.

5 NOW, I KNOW THERE WAS SOME SUBMISSION FROM THE
6 D.A.'S CONVERSATION WITH THE UNITED STATES ATTORNEY,
7 ASSISTANT UNITED STATES ATTORNEY IN THIS CASE, YOUR HONOR,
8 BUT I CAN TELL YOU I DON'T BELIEVE IT WAS BECAUSE THEY
9 DIDN'T HAVE THE VICTIM.

10 I BELIEVE THAT THAT PHRASE "UNABLE TO PROCEED"
11 WAS -- BECAUSE I MET WITH THE SUPERVISORS IN THAT
12 OFFICE -- AND I'M ONLY ITERATING THIS, YOUR HONOR, TO
13 PROTECT THE RECORD IF YOUR HONOR IS GOING TO GIVE IT SOME
14 CREDENCE. I WOULD ASK YOU TO DO THAT CAUTIOUSLY FOR THE
15 REASONS THAT I INDICATED, YOUR HONOR.

16 MY CLIENT SUBMITTED LETTERS. HE ASKED THAT HE
17 DOESN'T WANT TO PERSONALLY ADDRESS YOUR HONOR FOR THE
18 FOLLOWING REASON, THAT I HOPE --

19 DID YOUR HONOR RECEIVE HIS LETTER, MAY I
20 INQUIRE?

21 **THE COURT:** YES.

22 **MR. KESSEL:** OKAY. THANK YOU.

23 AND I THINK THAT LETTER BEspeaks OF A DEFENDANT
24 ADDRESSING THE COURT AND ADDRESSING THE COURT IN A MORE
25 ARTICULATE FASHION THAN THE RIGHT HE HAS TO ORALLY ADDRESS

1 YOUR HONOR. SO I DON'T WANT HIS PASSING ON --

2 **THE COURT:** THAT WAS PART OF YOUR INITIAL REPLY,
3 EXHIBIT A.

4 **MR. KESSEL:** IT WAS, YOUR HONOR. THANK YOU.

5 I DON'T WANT THAT TO -- THE FACT THAT HE
6 SUBMITTED SOMETHING IN WRITING AND DOESN'T WANT TO ORALLY
7 ADDRESS THE COURT, TO TAKE AWAY THAT HE TRULY SET FORTH
8 HIS FEELINGS, YOUR HONOR.

9 HE'S DONE ALMOST EIGHT AND A HALF MONTHS OF HOME
10 DETENTION. NOW, AS YOUR HONOR KNOWS, THERE'S DIFFERENT
11 DEGREES OF HOME DETENTION. HIS WAS FULL INTENSIVE
12 SUPERVISION. HE COULDN'T LEAVE FOR ONE MOMENT FROM HIS
13 HOUSE OTHER THAN FOR COURT AND ATTORNEY VISITS, AND I
14 WANTED YOUR HONOR TO KNOW THAT.

15 HE DIDN'T -- HE COULDN'T WORK, HE COULDN'T GO TO
16 SCHOOL. HE COULD DO NONE OF THAT FOR EIGHT MONTHS.

17 AND I JUST -- AGAIN, YOUR HONOR, I UNDERSTAND IT
18 MAY NOT EQUATE WITH, BY THE BUREAU OF PRISONS, TO PRETRIAL
19 CREDIT. BUT I WANT YOUR HONOR TO UNDERSTAND THAT THERE'S
20 BEEN SOME PUNITIVE MEASUREMENTS ALREADY AFFECTING MY
21 CLIENT VIA THE HOME DETENTION, YOUR HONOR.

22 AND I BELIEVE, YOUR HONOR, THAT THE 30-MONTH
23 SENTENCE -- I DID READ THE ONE IMPACT LETTER, AND I WOULD
24 ONLY INDICATE, YOUR HONOR, IF YOU ARE LOOKING AT THAT,
25 REVIEW AGAIN THE EXHIBITS THAT THE GOVERNMENT SUBMITTED.

1 THESE YOUNG WOMEN, CLEARLY BOTHERED BY IT, BUT
2 THEY STAY ON THE LINE WITH HIM, THE COMPUTER LINE IN THAT
3 SENSE. THEY CONTINUE TO TALK WITH HIM. THEY CONTINUE --
4 HE EVEN ADVISES THEM NEXT TIME WHAT THEY SHOULD DO TO NOT
5 HAVE AN INVASION OF THAT, AND THEY THANK HIM.

6 AND I'M NOT SUGGESTING HE SHOULD BE PATTED ON
7 THE BACK. I'M JUST SIMPLY INDICATING TO YOU THE LEVEL OF
8 INVOLVEMENT THAT THESE YOUNG WOMEN HAD WHEN THEY LEARNED,
9 YOUR HONOR, THAT THEY WERE NOT THEIR FRIEND OR THEIR
10 COUSIN OR SOMETHING AND THEY REMAINED ON THE LINE.

11 AND BE THAT AS IT MAY, YOU KNOW, WHAT WE DO IN
12 PRIVATE, THAT'S OUR BUSINESS. BUT MY CLIENT DIDN'T FORCE
13 THESE GIRLS TO TAKE PICTURES. THE PICTURES HE GOT WERE
14 TWO FORMS. AND I'M NOT AT ALL CONDONING HIS INVASION.

15 THERE WERE TWO WAYS. THESE GIRLS ALREADY HAD IN
16 THEIR EMAILS PHOTOGRAPHS OF THEIR NAKED BREASTS ALREADY,
17 SHARING WITH ONE ANOTHER, AND THINKING THAT HE WAS THEIR
18 FRIEND, THEY WERE ON THE INTERNET SHOWING THEMSELVES.

19 IT IN NO WAY JUSTIFIES HIS INVASION, YOUR HONOR,
20 BUT I'M JUST TRYING TO INDICATE TO YOU THERE MAY BE SOME
21 WOMEN THAT WOULD EVEN GO TO THAT LEVEL OF PROJECTING
22 THEMSELVES TO FRIENDS OR IN E-MAILS IN THAT WAY.

23 AND I WOULD SIMPLY, AGAIN -- THAT WAS MADE FOR
24 THE ARGUMENT OF HOW AGGRAVATING THE CIRCUMSTANCES ARE AND
25 HOW, AGAIN, THE PSYCHOLOGICAL DAMAGE TO THESE YOUNG WOMEN

1 HASN'T ROSE TO THE LEVEL JUSTIFYING THE DEPARTURE. AND I
2 WOULD URGE YOUR HONOR TO SENTENCE WITHIN THE GUIDELINES,
3 YOUR HONOR.

4 THANK YOU VERY MUCH.

5 **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH.

6 MR. KAZARYAN, I KNOW YOUR COUNSEL HAS SAID THAT
7 YOU DO NOT WISH TO BE HEARD ORALLY IN COURT, BUT
8 NEVERTHELESS, THE LAW REQUIRES ME TO PROVIDE YOU WITH THAT
9 OPPORTUNITY. SO I AM GOING TO TELL YOU THAT YOU HAVE THE
10 RIGHT TO ADDRESS THE COURT HERE IN OPEN COURT ORALLY, IF
11 YOU WISH TO DO SO BEFORE I IMPOSE SENTENCE.

12 DO YOU WISH TO DO SO?

13 **THE DEFENDANT:** NO, YOUR HONOR.

14 **THE COURT:** ALL RIGHT.

15 MS. WILKINSON, ON BEHALF OF THE UNITED STATES.

16 **MS. WILKINSON:** YES, YOUR HONOR.

17 **GOVERNMENT'S ARGUMENT**

18 **MS. WILKINSON:** THE GOVERNMENT VERY MUCH
19 BELIEVES THAT BASED ON THE NATURE AND CIRCUMSTANCES OF
20 THIS OFFENSE, THE 72-MONTH SENTENCE, WHICH IS THE SENTENCE
21 THAT WE RECOMMENDED, IS APPROPRIATE; AND THAT IS PRIMARILY
22 BECAUSE SUBSECTION 2B1.1 OF THE SENTENCING GUIDELINES
23 SIMPLY DOES NOT CAPTURE THE KIND OF HARM THAT THE
24 DEFENDANT PUT UPON HIS VICTIMS.

25 THE FOCUS OF THAT SECTION IS MONETARY LOSS, AND

1 FOR THESE WOMEN, IT WAS A MUCH MORE EMOTIONAL AND
2 PSYCHOLOGICAL HARM. AND I WANT TO POINT OUT THAT WE'RE
3 NOT TALKING ABOUT A DEPARTURE FROM THE GUIDELINES UNDER
4 SECTION 5K2.3, WHICH IS WHAT DEFENSE COUNSEL KEEPS HARPING
5 ON.

6 THIS IS A COMMENT WITHIN 2B1.1. THAT SAYS, HEY,
7 SOMETIMES THERE ARE GOING TO BE CONVICTIONS UNDER THIS
8 SUBSECTION THAT DON'T HAVE A MONETARY LOSS, WHERE THE GOAL
9 WAS SOMETHING ELSE, AND THAT IS THIS PARTICULAR CASE.

10 AND THE COMMENTARY TO 2B1.1 SAYS ITSELF THIS IS
11 A CASE WHERE A DEPARTURE, OR NOW THAT WE'RE, YOU KNOW, IN
12 THE POST-BOOKER WORLD, A VARIANCE UNDER 3553(A) IS
13 APPROPRIATE, AND IT DOESN'T HAVE TO RISE TO ANY KIND OF
14 LEVEL OF REPORTS AND ANALYSIS.

15 I SUBMIT TO YOUR HONOR THAT THE REPORTS TO LAW
16 ENFORCEMENT MADE BY THESE VICTIMS IN THE LETTER THAT WAS
17 SUBMITTED ARE SUFFICIENT. AND, IN FACT, I WANT TO SAY
18 SOME OF THE LETTERS -- OR SOME OF THE WORDS THAT THE
19 VICTIMS THEMSELVES USED IN SPEAKING TO LAW ENFORCEMENT
20 ABOUT THIS CASE IN THE LETTER, THEY SAID THAT THEY FELT
21 RAPED, THEY FELT THREATENED, THEY FELT ATTACKED,
22 TERRORIZED, TRAUMATIZED, PARANOID, EMOTIONALLY DISTRAUGHT,
23 UNSAFE.

24 THE GOVERNMENT ISN'T CALLING THIS RAPE,
25 YOUR HONOR. THE VICTIMS CALLED IT RAPE, AND THEY CALLED

1 IT RAPE BECAUSE IT FELT LIKE RAPE TO THEM. YOU COULD SEE
2 IN THE SKYPE CONVERSATIONS THAT THESE WOMEN ARE
3 PLEADING WITH HIM TO STOP. THEY ARE ASKING HIM TO PLEASE
4 STOP, AND I WOULD LIKE THE OPPORTUNITY TO READ THE LETTER
5 ALOUD IN COURT WHEN THE OPPORTUNITY ARISES.

6 I WANT TO TALK A LITTLE ABOUT THE FACT THAT
7 THERE ARE NO VICTIMS HERE TODAY. I WANT TO SAY THAT THIS
8 IS BECAUSE I SPOKE WITH THEM. I SPOKE TO, I DON'T KNOW,
9 PROBABLY TEN OF THEM.

10 AND TO A WOMAN, THEY WERE DESPERATELY AFRAID TO
11 COME HERE BECAUSE IN THIS PARTICULAR CASE THE DEFENDANT
12 KNEW A HUGE NUMBER OF HIS VICTIMS. HE WENT AFTER WOMEN
13 THAT HE KNEW. HE WENT AFTER PEOPLE THAT HE COULD FIGURE
14 OUT THEIR USER NAMES AND THEIR PASSWORDS, AND HE SPREAD
15 OUT FROM THERE.

16 AND THAT IS HORRIFYING TO THESE WOMEN, THAT THEY
17 WOULD HAVE TO COME IN HERE AND SEE SOMEONE THAT THEY KNEW
18 AND SPEAK ABOUT THIS AWFUL THING. AND THEY FELT AFRAID OF
19 HIM. THE VICTIM THAT DID SUBMIT A LETTER WOULD NOT LET ME
20 PUT HER NAME ON IT AND DIDN'T WANT TO COME IN BECAUSE SHE
21 WAS AFRAID, AND SHE CONTINUES TO BE AFRAID TO THIS DAY
22 BASED IN PART ON THE TRAUMA THAT COMES FROM KNOWING THAT
23 YOU KNOW THIS PERSON AND YOU KNOW WHO DID IT TO YOU.

24 I DON'T THINK THAT THAT SHOULD INURE TO THE
25 DEFENDANT'S BENEFIT. AND THE IDEA THAT OH, THE VICTIMS

1 AREN'T HERE OR THAT OH, THERE'S NOT ENOUGH FROM THEM TO
2 BASE ON THIS, I DON'T THINK THE FACT THAT HE HAS SCARED
3 AND TORTURED PEOPLE THAT HE KNOWS SHOULD INURE TO HIS
4 BENEFIT.

5 I WANT TO FURTHER TALK ABOUT HOW THE DEFENSE
6 ATTORNEY HAS TALKED ABOUT HOW HIS CASE IS LESS SERIOUS
7 THAN MIJANGOS IN SUBSTANCE. AND HE MAKES A COUPLE OF
8 ARGUMENTS, FOR EXAMPLE, THAT THE PICTURES IN MIJANGOS WERE
9 SEXUALLY EXPLICIT, AND HERE IN THIS CASE, HE WAS JUST
10 LOOKING FOR THEIR BREASTS.

11 I THINK THAT IS OFFENSIVE AND SHOULD BE
12 REJECTED. THESE WERE SEXUALLY EXPLICIT PHOTOS OF THESE
13 WOMEN'S BREASTS THAT THEY DID NOT WANT TO SHOW DEFENDANT,
14 AND THEY WERE SEXUALLY EXPLICIT PHOTOS OF THEIR NAKED
15 BODIES THAT HE WENT IN TO REACH HIS HANDS INTO THEIR EMAIL
16 ACCOUNTS AND GRAB, AND TO TRY AND DRAW SOME SORT OF
17 GRADATION THERE IS SOMETHING THAT SHOULD BE REJECTED.

18 ALSO SHOULD BE REJECTED IS THE ARGUMENT THAT IN
19 SOME FASHION BY HAVING A PICTURE OF THEMSELVES NAKED IN
20 THEIR EMAILS, THINKING THAT THEY HAD A PRIVATE RIGHT TO
21 THAT, THAT SOMEHOW THESE WOMEN WERE ASKING FOR THE CRIME
22 TO HAPPEN TO THEM AND THAT SOMEHOW THEY AREN'T AS AFFECTED
23 AS THEY SAY; WHEN THEY SAY THAT THEY ARE TERRORIZED, THEY
24 DON'T REALLY MEAN IT BECAUSE THEY WOULD SHOW THEIR NAKED
25 BODIES TO THEIR FRIEND. THAT IS AN OFFENSIVE ARGUMENT,

1 HONESTLY, AND SHOULD BE REJECTED.

2 HERE THE PICTURES WERE EXPLICIT. AND FRANKLY,
 3 REGARDLESS OF WHETHER THE PICTURES ARE OF ONE PART OF THE
 4 BODY OR ANOTHER, THIS IS ABOUT POWER. THE DEFENDANT SAID
 5 IN ONE OF HIS SKYPE CONVERSATIONS, "I HAVE THE POWER NOW,"
 6 AND THAT'S WHAT THIS WAS ABOUT. HE WAS EXERTING HIS POWER
 7 OVER THESE WOMEN, AND THEY FELT IT. THEY FELT IT EVEN
 8 THOUGH THERE WAS A COMPUTER SCREEN AND THEY WEREN'T
 9 PHYSICALLY THERE. AND THAT'S WHY I THINK THAT THESE
 10 WOMEN -- NOT THE GOVERNMENT -- THESE WOMEN CALLED IT
 11 "RAPE" BECAUSE THEY FELT THAT THEY DIDN'T HAVE CONTROL
 12 OVER WHAT THEY COULD DO.

13 AND I WANT TO CONNECT TO THAT THIS ARGUMENT THAT
 14 THE PICTURES WEREN'T POSTED PUBLICLY. THEY WERE POSTED
 15 PUBLICLY. TIME AND TIME AGAIN IN THE REPORTS -- AND THEY
 16 WERE SUBMITTED -- WE SEE THAT THEY ARE POSTED ON PEOPLE'S
 17 FACEBOOK ACCOUNTS. THAT'S EXTREMELY PUBLIC SOCIAL MEDIA
 18 AND TO THESE GIRLS' FRIENDS.

19 ONE WOMAN TALKED ABOUT HOW HER PICTURE WAS
 20 POSTED ON ANOTHER FRIEND'S FACEBOOK WALL, AND SO SHE CAN'T
 21 GET TO IT. SHE CAN'T TAKE IT DOWN. SHE'S CALLING UP HER
 22 FRIEND AND CRYING. ALL OF HER FRIENDS ARE CALLING HER AND
 23 SAYING, "WHY IS THERE A NAKED PICTURE OF YOU ON FACEBOOK?"

24 THIS WAS PUBLIC, AND HE DID HAVE POWER OVER
 25 THEM. AND TO SUGGEST THAT THEY SOMEHOW COULD HAVE TURNED

1 OFF THE COMPUTER AND, THEREFORE, IT'S NOT RAPE DOESN'T
2 UNDERSTAND THAT THEY -- THE POWER THAT HE DID HAVE OVER
3 THEM. HE HAD THESE NAKED PICTURES, AND HE USED THAT TO
4 GET MORE.

5 I WANTED TO TALK ABOUT THAT HE MENTIONED THAT
6 MIJANGOS HAD CHILD PORNOGRAPHY AND THIS CASE DIDN'T.

7 THAT'S JUST SIMPLY NOT TRUE. THERE WERE
8 UNDERAGE PICTURES IN THIS CASE. THE GOVERNMENT DECIDED
9 NOT TO PROSECUTE HIM FOR CHILD PORNOGRAPHY, BUT THE WHOLE
10 REASON THAT WE COULDN'T TURN OVER THE COMPUTER TO HIM WAS
11 THAT THERE WERE GIRLS THAT WE KNEW OF THAT WERE UNDERAGE,
12 17 -- 16 OR 17 YEARS OLD. AND FRANKLY, GIVEN THE LARGE
13 NUMBER OF PICTURES IN THIS CASE THAT WE COULDN'T IDENTIFY,
14 WE DIDN'T KNOW HOW MANY MORE THERE WERE. SO IT'S JUST
15 SIMPLY NOT TRUE TO DISTINGUISH IT ON THAT BASIS.

16 THE OTHER POINT THAT I WANTED TO MAKE WAS THAT
17 IT DID DISRUPT THEIR LIVES. HE SAID THAT MIJANGOS WAS
18 ABLE TO DISRUPT THEIR COMPUTERS, AND IT'S TRUE THAT
19 MIJANGOS WAS A MORE TECHNICAL MEANS. HE USED A VIRUS, AND
20 THAT IS A DISTINGUISHING FACTOR. BUT HE WAS ABLE TO
21 DISRUPT THEIR LIVES BY HIS SOCIAL ENGINEERING AND TAKING
22 OVER THEIR ACCOUNTS.

23 THE PSR POINTS OUT THAT THEY HAD THEIR -- THAT
24 THEY WERE LOCKED OUT OF THEIR ACCOUNTS, THEY HAD THEIR
25 PASSWORDS CHANGED. AND MOREOVER, ONCE THESE THINGS

1 HAPPENED, THEY NEEDED TO RESTART UP THEIR EMAIL ACCOUNTS
2 AND ALL OF THEIR PASSWORD ACCOUNTS AND ALL OF THOSE
3 THINGS, WHICH WAS A TREMENDOUS HASSLE. AND SO THERE WAS A
4 DISRUPTION OF THEIR LIVES BEYOND THE TORTURE OF THE
5 IMMEDIATE ACT.

6 I WANTED TO TALK FURTHER ABOUT THE NUMBERS
7 BECAUSE I FEEL LIKE THEY ARE GETTING LOST HERE.

8 DEFENSE COUNSEL KEEPS TALKING ABOUT HOW THIS
9 ONLY HAPPENED EIGHT OR NINE TIMES, AND FOR SOME REASON WE
10 KEEP IGNORING THE RELEVANT CONDUCT BEYOND THAT WHICH IS IN
11 THE INDICTMENT.

12 THE INDICTMENT DOES REFERENCE EIGHT TO NINE
13 TIMES. BUT AS THE GOVERNMENT SHOWED IN ITS PAPERS AND ITS
14 REFERENCE IN THE PSR, WE HAVE 372 VICTIMS; WE HAVE 1,100
15 NAKED PICTURES, 400 OF WHICH ARE FROM WEBCAMS OR SKYPE.
16 SO 400 PICTURES OF WOMEN SHOWING THEIR BREASTS TO THE
17 DEFENDANT. THAT IS MORE THAN EIGHT OR NINE TIMES. THAT'S
18 WAY MORE THAN EIGHT OR NINE TIMES, AND IT'S WAY MORE THAN
19 MIJANGOS.

20 SO THE SHEER VOLUME IN THIS CASE IS ONE OF THE
21 THINGS THAT SETS THE DEFENDANT ABOVE MIJANGOS IN TERMS OF
22 WHAT HIS CONDUCT WAS.

23 WE HAVE HIS DAILY ACCESS. I THOUGHT THE -- ONE
24 OF THE EXHIBITS WAS THE FACEBOOK ACCESS LOGS WHERE WE WENT
25 THROUGH AND WE SHOWED HOW OFTEN HE WAS ACCESSING BOTH HIS

1 OWN ACCOUNTS AND HIS VICTIM ACCOUNTS, AND THAT WAS JUST
2 FOR A VERY SHORT PERIOD OF TIME. AND WHEN IT'S OVER AND
3 OVER AND OVER AGAIN, DAILY, AND IT'S ONE OF THOSE THINGS
4 WHERE YOU JUST SEE THE SHEER VOLUME OF IT; AND YOU HAVE TO
5 COMPARE IT TO SOME OF THE LETTERS THAT YOU RECEIVED, YOUR
6 HONOR, FROM THE DEFENDANT'S FAMILY AND FIANCÉE, WHERE THEY
7 ARE SAYING, "OH, HE WAS WITH US DAILY, AND HE WASN'T
8 SHOWING ANY OF THIS BEHAVIOR." YOU HAVE TO WONDER ABOUT
9 THE PERSUASIVE VALUE OF THOSE LETTERS WHEN COMPARED WITH
10 THE ACTUAL FACTS FOUND ON THE DEFENDANT'S COMPUTER AND HIS
11 I.P. ADDRESS.

12 I THINK THAT IT IS CLEAR THAT WHEN YOU COMPARE
13 DEFENDANT'S CONDUCT TO OTHER CASES, WHEN YOU HAVE THE
14 EXTREME EMOTIONAL VIOLENCE, THE DAILY PERSISTENT EFFORT,
15 THE SHEER VOLUME, THE NATURE AND CIRCUMSTANCES OF THE CASE
16 ABSOLUTELY CALL FOR THE 72 MONTHS.

17 BUT I DO ALSO WANT TO TALK ABOUT THE DEFENDANT'S
18 HISTORY AND CIRCUMSTANCES BECAUSE I THINK THAT'S SOMETHING
19 IMPORTANT TO TALK TO AS WELL.

20 THE DEFENDANT PROFFERED TO PUT FORTH SOME
21 LETTERS AND A LETTER FROM DR. MARKMAN. AND I THINK, IN
22 CONSIDERING THOSE, YOU HAVE TO CONSIDER THE RAPE
23 ALLEGATION.

24 AND I WANT TO BE VERY CLEAR ABOUT WHAT I'M
25 ASKING THE COURT TO DO BECAUSE I'M NOT ASKING THE COURT TO

1 MAKE AN UP-AND-DOWN FINDING ABOUT WHETHER OR NOT THE RAPE
2 OCCURRED. I'M NOT SAYING THAT THE RAPE ALLEGATION IS THE
3 REASON FOR THE ENHANCEMENT IN THE FIRST PLACE OR THE
4 REASON FOR THE VARIANCE IN THE FIRST PLACE.

5 BUT WHEN THE COURT IS CONSIDERING THE
6 DEFENDANT'S LETTERS IN MITIGATION AND TRYING TO DECIDE
7 WHETHER OR NOT THERE ARE MITIGATING FACTORS THAT SUPPORT A
8 LOWER SENTENCE, I THINK YOU CAN CONSIDER WHAT THESE OTHER
9 PEOPLE HAVE SAID ABOUT THE DEFENDANT -- WHAT THE VICTIMS
10 SAID, WHAT THE WITNESS SAID.

11 AND, YOU KNOW, THE DEFENSE ATTORNEY HAS MADE A
12 LOT OF OBJECTIONS AS TO THE FORM THAT IT'S COMING TO YOUR
13 HONOR, AND NOW YOUR HONOR HAS SOME OF THE PRELIMINARY
14 HEARING TRANSCRIPTS. BUT THERE'S NOT A LOT -- ANY WAY TO
15 DISPUTE WHAT THEY ACTUALLY SAID.

16 THIS IS WHAT THEY SAID, AND I THINK THAT WHEN
17 YOU CONSIDER WHAT THEY SAID ABOUT DEFENDANT'S BEHAVIOR IN
18 THE RAPE ALLEGATION, WHICH IS THAT THE VICTIM POINTED
19 OUT -- THE DEFENDANT AS RAPING HER.

20 AND ONE OF THE WITNESSES SAID THAT HE ARRIVED,
21 SAW THE DEFENDANT OUTSIDE OF THE CAR. THE DEFENDANT SAID
22 THAT THE VICTIM WAS INSIDE AND WOULD BE OUT IN FIVE
23 MINUTES, INDICATING KNOWLEDGE OF WHAT WAS HAPPENING. THE
24 WITNESS GOES IN, PULLS HER OFF AS SHE SORT OF COLLAPSED ON
25 A MAN WITH HIS PANTS DOWN, AND PUTS HER IN THE CAR. AND

1 THAT THEN D.N.A., THE DEFENDANT'S D.N.A. IS FOUND IN THE
2 VICTIM'S VAGINA, AND THE VICTIM'S D.N.A. IS FOUND ON THE
3 DEFENDANT'S PENIS.

4 THERE'S, I THINK, STATEMENTS THERE THAT ALLOW
5 THE COURT TO COMPARE THE MITIGATING ALLEGATIONS FROM THE
6 DEFENSE TO THESE OTHER STATEMENTS MADE, AND I THINK THAT
7 MY POINT IS -- IF I COULD GET TO MY POINT -- WHICH IS WHAT
8 THESE THINGS SAY IS THAT THE DEFENDANT VALUES POWER OVER
9 WOMEN. THE CONDUCT IS VERY SIMILAR. WHAT THEY SAY HE DID
10 AS TO WHAT HE SAID HAPPENED HERE, HE'S VALUING THE POWER
11 OVER WOMEN. HE DISRESPECTS WOMEN. HE HAS A DISREGARD FOR
12 OTHERS. HE HAS DISREGARD FOR LAW ENFORCEMENT.

13 IN FACT, I WAS STRUCK BY HOW THE DEFENDANT
14 DESCRIBED THE OFFENSE TO DR. MARKMAN VERSUS HOW THE
15 VICTIMS DESCRIBED IT, AND I HAVE TOLD YOU HOW THE VICTIMS
16 DESCRIBED IT. BUT IN DR. MARKMAN'S LETTER, HE STATES THAT
17 THE VICTIM -- HE SAYS -- HE REPORTS WHAT THE DEFENDANT
18 SAYS. ONE MOMENT, PLEASE.

19 (GOVERNMENT COUNSEL REVIEWING DOCUMENTS.)

20 **MS. WILKINSON:** DR. MARKMAN IS JUST SORT OF
21 REPORTING HIS CONVERSATION WITH THE DEFENDANT. AND HE
22 SAYS WITH RESPECT TO THE RAPE ALLEGATION (AS READ:)

23 "WE WERE DRINKING, AND SHE WALKED IN AND
24 CLAIMED RAPE WHEN A FRIEND SAW HER. ONE WEEK IN
25 CUSTODY, DISMISSED WITH PREJUDICE AFTER THREE

1 YEARS."

2 (END QUOTED MATERIAL.)

3 **MS. WILKINSON:** AND THAT WAS REALLY TELLING TO
4 ME IN TERMS OF HOW THE DEFENDANT SAW THAT SITUATION AND
5 HOW THE DEFENDANT SEES THIS SITUATION AND HOW THE FACTORS
6 IN MITIGATION REALLY AREN'T EXISTING AT ALL.

7 AND SPEAKING OF DR. MARKMAN'S REPORT, I DO WANT
8 TO POINT OUT -- I'M NOT SAYING THAT I DON'T THINK
9 DR. MARKMAN IS A DOCTOR. I THINK HE'S A DOCTOR. HE COULD
10 BE FREUD FOR ALL I CARE. BUT IF ALL YOU ARE DOING IS
11 SITTING DOWN WITH SOMEBODY, READING THE INDICTMENT, AND
12 RECITING BACK TO US WHAT THE DEFENDANT HAS SAID, IT'S JUST
13 NOT A PERSUASIVE LETTER.

14 AND SO I WOULD SUBMIT TO THE COURT THAT THAT IS
15 JUST SIMPLY NOT A PERSUASIVE AMOUNT OF INFORMATION TO
16 CONCLUDE THAT THERE ARE MITIGATING FACTORS IN THIS CASE
17 THAT WARRANT A LOWER SENTENCE.

18 I THINK THAT IS SORT OF MY POINT WITH RESPECT TO
19 ALL OF THIS, THAT THERE'S NO MITIGATING FACTORS THAT
20 SUPPORT A LOWER SENTENCE AND THAT, IN COMPARISON WITH THE
21 EXTREME CONDUCT THAT IS NOT ACCOUNTED FOR BY 2B1.1, A
22 VARIANCE IS ABSOLUTELY APPROPRIATE AND A 72-MONTH SENTENCE
23 IS ABSOLUTELY APPROPRIATE.

24 THANK YOU.

25 **THE COURT:** YOU WERE GOING TO ALSO READ A LETTER

1 THAT YOU SAID YOU WANTED TO.

2 **MS. WILKINSON:** YES.

3 **MR. KESSEL:** MAY I INDICATE THE OBJECTION I HAVE
4 TO READING THE LETTER? ONLY BECAUSE IT'S BEEN SUBMITTED
5 AND IS PART OF THE RECORD, YOUR HONOR. UNLESS THE COURT
6 FEELS -- I ASSUME THE GOVERNMENT WANTS TO READ THE LETTER
7 TO GIVE THE COURT THE INFORMATION WHICH THE COURT ALREADY
8 HAS.

9 THAT'S MY CONCERN ABOUT READING ONE LETTER
10 VERSUS ALL MY CLIENT'S LETTERS AND HIS LETTER IN OPEN
11 COURT. THE COURT'S RECEIVED THAT, OBVIOUSLY, WAY IN
12 ADVANCE OF TODAY'S HEARING.

13 **THE COURT:** THE OBJECTION IS OVERRULED. THIS IS
14 IN THE NATURE OF A STATEMENT --

15 I TAKE IT THIS IS A VICTIM STATEMENT?

16 **MS. WILKINSON:** VICTIM STATEMENT.

17 **THE COURT:** IT IS A VICTIM STATEMENT, AND IF THE
18 VICTIM WERE HERE, THE VICTIM WOULD BE ENTITLED TO ADDRESS
19 THE COURT ORALLY HERE IN COURT, DESPITE THE FACT THAT THE
20 VICTIM MAY HAVE ALSO WRITTEN SOMETHING.

21 SO I THINK THAT IS A DISTINCTION, AND YOUR
22 OBJECTION IS OVERRULED.

23 **MR. KESSEL:** THANK YOU, YOUR HONOR.

24 **THE COURT:** AND YOU MAY PROCEED, MS. WILKINSON.

25 **MS. WILKINSON:** YES, YOUR HONOR.

1 IT READS (AS READ:)

2 "HONORABLE JUDGE KING, I'M WRITING THIS
3 IMPACT STATEMENT FOR A NUMBER OF REASONS. I HOPE
4 TO FIRST AND FOREMOST EXPRESS MY FEELINGS ABOUT
5 THE CRIME THAT WAS COMMITTED. I WILL ALSO SPEAK
6 TO THE RESIDUAL EFFECTS OF THE CRIME SUCH AS MY
7 FEELINGS FOR THE DEFENDANT, MYSELF, AS WELL AS THE
8 INTERNET.

9 "I NEVER IMAGINED THAT I WOULD BE THE
10 VICTIM OF A CRIME THAT WAS COMMITTED BY THE
11 DEFENDANT. IT WAS ONE OF THOSE THINGS THAT PEOPLE
12 NEVER IMAGINE HAPPENING TO THEMSELVES. IF
13 ANYTHING, PEOPLE, INCLUDING MYSELF, BEFORE IT
14 HAPPENED TO ME OFTEN ATTRIBUTE IT TO THE
15 CARELESSNESS OR THE CHARACTER OF THE VICTIMS LIKE
16 MANY OTHER CRIMINAL OFFENSES AGAINST WOMEN THAT
17 ARE NOT WELL UNDERSTOOD BY OUR SOCIETY.

18 "I ATTEND A TOP-TEN LAW SCHOOL. I WAS
19 A JUDICIAL EXTERN FOR THE (REDACTED) OF
20 CALIFORNIA, AND I HAVE ALWAYS BEEN EXTREMELY
21 CAREFUL WITH EVERY ASPECT OF MY LIFE. THIS WAS
22 BEYOND THAT. THIS WAS BEYOND ME.

23 "THE DEFENDANT STOLE INFORMATION, WAS
24 MANIPULATIVE BEYOND BELIEF, AND HURT ME
25 REPEATEDLY. EVEN AFTER, THE FEAR OF SOMETHING

1 LIKE THAT HAPPENING AGAIN HAS NOT LEFT MY MIND.

2 THE DEFENDANT IS AN INDIVIDUAL WHO IS A FAMILY

3 FRIEND, WHO ATTENDED MY HIGH SCHOOL, AND WHO

4 OCCASIONALLY DROVE ME TO SCHOOL MANY YEARS AGO.

5 I'M CONVINCED THAT HE WILL BE A THREAT TO BOTH MY

6 COMMUNITY AND ME. HE CERTAINLY MADE THREATENING

7 COMMENTS PRIOR TO HIS ARREST, AND I FEAR THE

8 EFFECTS OF SUCH AN INDIVIDUAL BEING RELEASED INTO

9 OUR COMMUNITY SHOULD HE NOT FACE THE APPROPRIATE

10 CONSEQUENCES FOR HIS CRIME.

11 "IT'S DIFFICULT TO UNDERSTAND HOW

12 SOMEONE CAN DO WHAT THE DEFENDANT DID AND HIS

13 MOTIVES BEHIND THE CRIME. IT HAS MADE IT

14 DIFFICULT FOR ME TO TRUST ANY INDIVIDUAL THAT I

15 MEET WHEN SOMEONE THAT I KNEW PERSONALLY COULD

16 HAVE DONE SOMETHING SO ABOMINABLE.

17 "FINALLY, WHILE MY COMPUTER AND THE

18 INTERNET ARE ESSENTIAL TO NETWORKING, LEARNING,

19 STORING INFORMATION, AND WORKING, I NO LONGER FEEL

20 FULLY COMFORTABLE USING EITHER ONE. I HAVE NO

21 PEACE OF MIND. I MAKE SURE TO DELETE EMAILS THAT

22 CONTAIN CONFIDENTIAL INFORMATION. I NO LONGER

23 STORE PHOTOGRAPHS ON MY COMPUTER, AND I HAVE

24 DEACTIVATED MY SOCIAL NETWORKING ACCOUNTS.

25 "IT GOES WITHOUT SAYING THAT EVERYONE

1 MUST TAKE PROPER PRECAUTIONS WHEN DEALING WITH
2 UNKNOWN INDIVIDUALS ON THE INTERNET. HOWEVER,
3 THAT WAS FAR FROM THE CASE HERE AT HAND.

4 "NO ONE SHOULD BE KEPT FROM USING
5 COMPUTER PROGRAMS TO COMMUNICATE WITH FRIENDS AND
6 FAMILY, BUT THAT IS ONE OF THE MANY CONSEQUENCES
7 OF THE DEFENDANT'S CRIME.

8 "THANK YOU FOR YOUR TIME."

9 (END QUOTED MATERIAL.)

10 **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH.

11 MR. KESSEL, IF YOU WANT TO HAVE A FEW MINUTES TO
12 RESPOND TO THE GOVERNMENT'S ARGUMENT, YOU MAY.

13 **DEFENSE FURTHER ARGUMENT**

14 **MR. KESSEL:** JUST LESS THAN A FEW MINUTES, YOUR
15 HONOR. THANK YOU, YOUR HONOR.

16 I WANT TO KNOW A COUPLE THINGS:

17 ONE, MY CLIENT'S LETTERS IN MITIGATION ARE FROM
18 PEOPLE THAT CARE ABOUT HIM, NATURALLY. MANY OF THE
19 PICTURES, WHEN WE WENT TO GO AND PROFFER WITH THE
20 GOVERNMENT, AT LEAST ON ONE OCCASION WHERE THEY GAVE US
21 SOMEWHAT, WHAT WAS CALLED A "REVERSE PROFFER," MANY OF
22 THOSE -- AND THEY DIDN'T KNOW THOSE WERE PICTURES OF HIS
23 OWN FIANCÉE.

24 I WANT TO NOTE THAT, YOUR HONOR, WHO WROTE THE
25 LETTER, WHO'S ALSO GOING TO LAW SCHOOL AND THE LIKE. I'M

1 NOT SUGGESTING THAT SHE'S ASKING YOUR HONOR TO DEEM THIS
2 PERSON NOT GUILTY; IT JUST GIVES A BACKGROUND INTO THE
3 PEOPLE THAT HE WAS AROUND, YOUR HONOR.

4 THE OTHER THING I WANTED TO NOTE, YOUR HONOR, IS
5 THAT -- AGAIN, I KNOW YOUR HONOR PROBABLY PERUSED THE
6 COMPUTER MESSAGES. AND I JUST HEARD A LETTER FROM A
7 VICTIM, AND THEN I ALSO HEARD THE GOVERNMENT SAYS THEY
8 DON'T WANT TO BE HERE, NOBODY ELSE SEEMED TO WANT TO
9 ADDRESS THE COURT IN WRITING.

10 MY ONLY CONCERN IS, YOUR HONOR, I THINK WHAT
11 BEspeaks of the nature of these women's feelings are the
12 text messages where, again, they're engaging my client
13 even after learning that their computer had been hacked.

14 NOW, I'M NOT SUGGESTING, YOUR HONOR --

15 **THE COURT:** WHAT ARE YOU TALKING ABOUT IN TERMS
16 OF ENGAGING? GIVE ME SOME EXAMPLES.

17 **MR. KESSEL:** YES.

18 **THE COURT:** I HAVE ACTUALLY READ THESE MESSAGES
19 AND THE VARIOUS GOVERNMENT EXHIBITS. NOT ALL OF IT IS AS
20 DISTURBING AS OTHERS, BUT CLEARLY THERE'S SOME VERY
21 DISTURBING PLEAS FOR YOUR CLIENT TO PLEASE STOP, AND YOUR
22 CLIENT SEEMED TO BE QUITE CALLOUS TO IT.

23 SO I WOULD LIKE TO UNDERSTAND YOUR ARGUMENT,
24 MR. KESSEL.

25 **MR. KESSEL:** I AGREE IN THERE THERE'S TIMES THEY

1 ARE SAYING, "STOP," YOUR HONOR. BUT I'M ALSO AGREEING
2 THAT WHAT YOU CAN DO -- THEY DON'T TURN OFF AND UN-CLICK
3 THE COMPUTER AND STOP CHATTING WITH HIM, YOUR HONOR.

4 **THE COURT:** YOU DON'T THINK THE FEAR THAT HE
5 INSTILLED IN THEM MAY HAVE SOMETHING TO DO WITH IT?

6 **MR. KESSEL:** THEY DON'T SAY THAT IN THEIR --

7 **THE COURT:** NO, IF SOMEBODY CALLS ME UP AND
8 SAYS, "I HAVE SOME REALLY COMPROMISING PICTURES OF YOU.
9 UNLESS YOU DO SOMETHING FOR ME, I'M GOING TO PUBLISH IT,"
10 AND YOU THINK I'M JUST GOING TO NECESSARILY SAY, "OH,
11 FINE." CLICK. "SEE YOU LATER."

12 YOU THINK THAT JUST WIPES IT OUT CLEAN?

13 **MR. KESSEL:** NO. I DIDN'T SAY THAT JUST MAKES
14 IT JUSTIFIABLE, YOUR HONOR.

15 I'M SIMPLY INDICATING IT -- IT WAS NOT ONLY JUST
16 NOT HANGING UP, IT WAS MORE ASKING HIM, "WELL, IF I SHOW
17 YOU THIS PICTURE," NOT -- NOT "WILL YOU GO AWAY," THERE
18 WAS MORE COMMENTS ABOUT THESE WOMEN TALKING ABOUT WHAT IS
19 HE GOING TO DO WITH THE PICTURE. THERE'S MORE COMMENTS --

20 **THE COURT:** YOU DON'T THINK THAT'S RELEVANT?

21 IF SOMEBODY IS SAYING SEND ME SOME COMPROMISING
22 PICTURES OF YOURSELF, YOU KNOW, AND THEY ARE BEING
23 THREATENED TO DO SO, YOU DON'T THINK THAT'S REASONABLE
24 THAT SOMEBODY MIGHT WANT TO KNOW, "WELL, WHAT EXACTLY ARE
25 YOU GOING TO DO WITH THIS COMPROMISING PICTURE THAT YOU

1 WANT ME TO SEND TO YOU?"

2 I WOULD REALLY LIKE YOU TO TELL ME SPECIFICS
3 RATHER THAN THE --

4 **MR. KESSEL:** YES.

5 **THE COURT:** -- NON-SPECIFICS IN TERMS OF --

6 WELL, WHAT ARE YOU EXACTLY SAYING? I'M
7 CONCERNED ABOUT THAT.

8 **MR. KESSEL:** I'M LOOKING AT EXHIBIT E, FOR
9 EXAMPLE, YOUR HONOR.

10 **THE COURT:** ALL RIGHT. LET'S LOOK AT EXHIBIT E.

11 **MR. KESSEL:** THANK YOU.

12 **THE COURT:** WHAT PAGE?

13 **MR. KESSEL:** IT'S A FACEBOOK FROM (NAME
14 REDACTED) AND (REDACTED) -- WHICH IS PURPORTEDLY MY
15 CLIENT. THERE'S A NUMBER OF SCREEN SHOTS, IF YOU WILL,
16 YOUR HONOR, WHERE THERE'S SOME PHOTOS OF THE PERSON AS
17 WELL. IF THE COURT CAN SEE THAT UNDER THE --

18 **THE COURT:** JUST GIVE ME THE PAGE. REFER ME TO
19 SPECIFICALLY WHAT YOU'RE TALKING ABOUT THAT BEARS OUT YOUR
20 ARGUMENT THAT SOMEHOW THESE VICTIMS WERE NOT SO AFFECTED
21 BY IT AS, IN FACT, THAT THEY CONTINUED TO CONVERSE WITH
22 YOUR CLIENT.

23 SO TELL ME WHERE IS IT THAT I CAN LOOK TO
24 SUPPORT YOUR ARGUMENT.

25 **MR. KESSEL:** I'M TRYING TO GET A PAGE NUMBER.

1 **THE COURT:** YOU CAN JUST TELL ME HOW MANY PAGES
2 FROM THE TOP, FROM THE BEGINNING, FROM THE FIRST PAGE.

3 **MR. KESSEL:** IT'S THAT WHOLE CHAT, YOUR HONOR.
4 IT'S ONLY FIVE -- I BELIEVE, SIX PAGES IN TOTAL. EXCUSE
5 ME, IT'S ONLY FIVE PAGES IN TOTAL. EXHIBIT E IS FIVE
6 PAGES.

7 IT'S ONE SCREEN CAPTION COMMUNICATION, YOUR
8 HONOR. AND IT HAS PICTURES, AND IT HAS THE SPEAKERS AS
9 (REDACTED) -- I DIDN'T KNOW IF I COULD PUT IT IN THE
10 RECORD, BUT IT'S IN THE RECORD. THESE ARE DISCLOSED IN
11 THE EXHIBITS, YOUR HONOR. BUT I'M JUST TRYING TO
12 HIGHLIGHT. AND THEN THERE'S A (REDACTED).

13 DOES THE COURT SEE THAT?

14 **THE COURT:** I DO.

15 **MR. KESSEL:** THAT TYPE OF COMMENT WHERE --

16 **THE COURT:** WHAT KIND OF COMMENT ARE YOU TALKING
17 ABOUT?

18 **MR. KESSEL:** I'M GOING TO THE FOURTH PAGE, THE
19 FIRST PAGE FROM THE LAST PAGE.

20 **THE COURT:** FIRST PAGE FROM -- THE
21 SECOND-TO-THE-LAST PAGE. RIGHT?

22 **MR. KESSEL:** YES.

23 **THE COURT:** ALL RIGHT. OKAY. WHERE? STARTING
24 WHERE? THERE ARE ONE, TWO, THREE, FOUR, FIVE ENTRIES.

25 **MR. KESSEL:** THE FOURTH CAPTION DOWN,

1 (REDACTED) AT DECEMBER 18, 2:26. DO YOU SEE THAT, YOUR
2 HONOR?

3 **THE COURT:** YES, I DO.

4 **MR. KESSEL:** OKAY. IF YOU READ THAT, THEY KNOW
5 THAT MY CLIENT'S NOT (REDACTED), AND THEY ARE ASKING, "IF
6 YOU WANT OUR PICTURE" --

7 AND THEY'RE TALKING ABOUT IF YOU WANT ME AND
8 {REDACTED}, WHY DON'T YOU TRY TO ADD US ON YOUR OWN
9 ACCOUNT?

10 SO WHAT THEY ARE SAYING IS DON'T BE SECRET AND
11 DON'T USE OUR ACCOUNT AND HIDE, USE OUR OWN ACCOUNTS. WHY
12 DON'T YOU PUT OUR PICTURES ON YOUR OWN ACCOUNT? MEANING
13 THE DEFENDANT'S OWN ACCOUNT.

14 I'M TRYING TO GIVE YOUR HONOR A FLAVOR OF THAT
15 THESE GIRLS AREN'T SAYING OH, WE'RE SCARED; WE'LL DO IT.
16 THEY ARE EVEN GIVING HIM A SUGGESTION THAT HE PUT THEIR
17 PICTURES -- AND THERE ARE FRIENDS IN THE PICTURES.

18 YOU GOT TO UNDERSTAND THESE ARE PICTURES WHERE
19 SOME OF THE GIRLS WOULD SHOW THEIR BREASTS, YOU KNOW, IN
20 HUGGING OR SOMETHING LIKE THAT.

21 THAT'S AN EXAMPLE, YOUR HONOR, THAT I'M
22 INDICATING THAT THEY'RE EVEN SUGGESTING YOU DON'T HAVE TO
23 SNEAK AROUND. JUST PUT IT ON YOUR OWN ACCOUNT.

24 THAT WAS THE KIND OF COMMENT THAT I MADE, AND
25 THAT NONE OF IT --

1 AND ON THE NEXT PAGE, YOUR HONOR, THE NEXT PAGE,
2 THE LAST PAGE.

3 **THE COURT:** YES.

4 **MR. KESSEL:** AT THE TOP, (REDACTED), THAT'S
5 THE VICTIM, YOU'LL FIND, "IF YOU DON'T WANT TO COME TO US,
6 ENJOY YOUR DAY, SWEETIE" AND THERE'S COMMENTS LIKE --

7 YOUR HONOR, I UNDERSTAND ABOUT VICTIMS BEING
8 SCARED AND DOING THINGS, BUT THEIR COMMENTS TO MY CLIENT
9 "PUT OUR PICTURES ON YOUR OWN THING." "COME TO US,"
10 MEANING PUT US ON YOUR OWN SCREEN. "ENJOY YOUR DAY,
11 SWEETIE" -- I MEAN, THOSE DON'T SEEM TO BE WOMEN WHO ARE
12 PETRIFIED BY THE FEAR THAT THE GOVERNMENT TALKS ABOUT.
13 THAT'S ALL I WANTED TO NOTE.

14 AND THERE WAS NO DISSEMINATION OF ANY OF THESE
15 PICTURES.

16 **THE COURT:** THIS IS ONE EXAMPLE OF ONE PERSON IN
17 THIS EXHIBIT E. RIGHT?

18 **MR. KESSEL:** YOUR HONOR, THAT WAS THE ONE. ALL
19 THE OTHERS -- THERE ARE OTHERS, YOUR HONOR. THERE'S
20 OTHERS IN C AND D WHERE THAT WAS THE ONE SCREEN SHOT THAT
21 THE GOVERNMENT GAVE YOU. THERE ARE OTHERS, COMPUTER
22 MESSAGES --

23 **THE COURT:** AND UNDER D, AT LEAST, THERE ARE
24 PARTS OF IT WHERE THIS PERSON IS SUPPOSEDLY SAYING, "I'M
25 NOT GOING TO TAKE IT AS A COMPLIMENT. YOU'RE GOING TO

1 RUIN MY GOOD REPUTATION."

2 **MR. KESSEL:** I AGREE, THERE'S THOSE COMMENTS,
3 YOUR HONOR. I AGREE THAT THOSE COMMENTS --

4 **THE COURT:** AND AT SOME POINT, YOUR CLIENT
5 SAYS (READING:)

6 "AND AT THIS POINT, I HAVE POWER."

7 AND THEN SHE SAYS, "DO YOU UNDERSTAND YOU
8 DON'T HAVE POWER?"

9 AND YOUR CLIENT SAYS, "I CAN GET INTO ALL YOUR
10 FRIENDS ACCOUNTS AND PUT THAT PIC -- " PICTURE "OF
11 YOU HALFWAY FLASHING AS THEIR PROFILE. WANT ME TO
12 NAME YOUR FRIEND AND DO IT NOW?"

13 "NO."

14 "OKAY. SO ALL I ASK IS SIMPLE AND IS ALL OVER
15 AND YOU'LL NEVER HEAR FROM ME AGAIN AND YOU'LL
16 PRETEND IT NEVER" -- I SUPPOSE IT NEVER HAPPENED.

17 "PLEASE STOP IT."

18 "COME ON AND FLASH REGULARLY."

19 "NO.

20 "OKAY. IS THAT YOUR FINAL ANSWER? I'LL GIVE
21 YOU A MINUTE TO THINK. I CAN SEND YOU THE PIC IF
22 YOU WANT, AND YOU DECIDE IS IT GOOD OR BAD. YOU
23 SURE ABOUT THIS? MAKE SURE YOU'RE ON TOMORROW
24 NIGHT. YOU'LL GET A SURPRISE."

25 "HI.

1 "YEAH.

2 "HEY, HOW ARE YOU?

3 "HI."

4 (END QUOTED MATERIAL.)

5 **THE COURT:** THAT SEEMS QUITE THREATENING TO ME,
6 AND THAT SEEMS LIKE SOMETHING THAT IS CERTAINLY
7 JUSTIFIABLE FOR WHAT THE GOVERNMENT HAS CHARACTERIZED AS
8 SOME OF THESE CONVERSATIONS.

9 OBVIOUSLY, I DON'T HAVE ALL OF THE
10 CONVERSATIONS, BUT THERE ARE SOME VERY DISTURBING
11 COMMUNICATIONS THAT YOUR CLIENT ENGAGED IN TO DEMAND THAT
12 THESE INDIVIDUALS COMPLY WITH HIS REQUESTS.

13 **MR. KESSEL:** YOUR HONOR, I AGREE WITH THE COURT,
14 AND I'M NOT STANDING UP HERE INDICATING THAT'S WHY HE'S --
15 HE PLED GUILTY. HE'S BEING SENTENCED AS BEING GUILTY FOR
16 A SERIOUS CRIME. THERE'S NO QUESTION.

17 I WAS JUST TRYING TO INDICATE TO YOUR HONOR THAT
18 CERTAIN OF THE VICTIMS WHO ACTUALLY SHOWED THEIR PICTURES
19 WERE ENGAGED IN COMMENTS AND EVEN SUGGESTED THAT THEIR
20 PICTURE SHOULD BE PUT ON HIS VERSUS "DON'T USE OUR" AND
21 "YOU DON'T HAVE TO PLAY THIS" -- "TAKE THE IDENTITY OF
22 SOMEBODY AND ACT AS IF YOU'RE SOMEBODY ELSE. YOU CAN
23 DIRECTLY ASK US, AND WE'LL SEND YOU THE PICTURES
24 DIRECTLY."

25 THAT'S JUST THE TYPE OF THING THAT I WANTED TO

1 SHOW, YOUR HONOR. I AM NOT AT ALL MINIMIZING THE SEVERITY
2 OF THE CONDUCT HERE, BUT TRYING TO GIVE YOUR HONOR SOME
3 DEGREE OF EVIDENCE THAT SUGGESTS THAT IT DOESN'T WARRANT
4 AN UPWARD DEPARTURE.

5 **THE COURT:** MS. WILKINSON.

6 **GOVERNMENT'S FURTHER ARGUMENT**

7 **MS. WILKINSON:** YOUR HONOR, I JUST WANTED TO
8 TAKE A MOMENT TO CLARIFY THE RECORD WITH RESPECT TO THE
9 EXHIBIT THAT THE COURT AND DEFENSE COUNSEL ARE JUST
10 LOOKING AT.

11 **THE COURT:** WHICH ONE? WE LOOKED AT MORE THAN
12 ONE EXHIBIT. ARE YOU TALKING ABOUT E?

13 **MS. WILKINSON:** YEAH, EXHIBIT E, PAGE 1, 2, 3 --
14 PAGE 4 OF EXHIBIT E, WHERE IT SAYS, "WHY DON'T YOU TRY TO
15 ADD US ON YOUR OWN ACCOUNT."

16 **THE COURT:** YES, I HAVE IT.

17 **MS. WILKINSON:** I WANT TO CLARIFY THAT WHAT
18 SHE'S SAYING IS NOT "PLEASE PUT OUR NAKED PICTURES ON YOUR
19 FACEBOOK PAGE."

20 SHE'S SAYING "IF YOU ACTUALLY LIKE ME, GO AND BE
21 ON YOUR FACEBOOK ACCOUNT IN YOUR OWN NAME AND TRY TO ADD
22 ME AS A FRIEND. ADD ME AS A FRIEND ON YOUR OWN ACCOUNT,"
23 BUT NOT "YOU MAY TAKE OUR PICTURES AND POST THEM PUBLICLY
24 ON YOUR OWN ACCOUNT."

25 SHE'S SAYING -- AND SHE SAYS IT REPEATEDLY --

1 "LEAVE US ALONE. STOP. WHY ARE YOU DOING THIS?"

2 YOU KNOW, HE HAS POSTED A NAKED PICTURE OF ONE
3 OF HER FRIENDS INTO HER PICTURES, AND SHE'S SAYING, "WHY
4 ARE YOU DOING THIS? PLEASE STOP. LEAVE ME ALONE."

5 AND IN FACT, THIS VICTIM IS THE ONE THAT'S
6 REFERENCED IN EXHIBIT G, WHICH HAS THE POLICE REPORTS AT
7 BATES 52, WHERE AT 53, WHERE SHE TALKS ABOUT WHAT
8 HAPPENED, AND SHE SAYS THAT SHE FELT THREATENED AND
9 TERRORIZED BY THIS INDIVIDUAL. SHE HAD TO CLOSE OUT HER
10 FACEBOOK ACCOUNT, CHANGE HER EMAIL ACCOUNTS, AND IS
11 CURRENTLY FEARFUL OF USING THE INTERNET AND THE COMPUTER.

12 SO, YES, WE HAVE A VICTIM WHO, WHEN THE
13 DEFENDANT ASSAULTS HER, SAYS "PLEASE STOP. AND WHY ARE
14 YOU DOING THIS? AND, HEY, CAN I SOMEHOW MAKE YOU FEEL
15 BETTER SO THAT YOU WILL LEAVE ME ALONE AND GO AND LOOK AT
16 SOME OTHER VICTIM?" BUT THAT DOESN'T MAKE HIS CONDUCT ANY
17 BETTER.

18 SUBMITTED.

19 **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH.

20 **MR. KESSEL:** THANK YOU, YOUR HONOR.

21 **THE COURT:** I HAVE FULLY CONSIDERED THE RECORD
22 IN THIS CASE, AND I HAVE HEARD EXTENSIVELY FROM COUNSEL,
23 BOTH IN WRITING AS WELL AS ORALLY. I HAVE GIVEN THE
24 DEFENDANT AN OPPORTUNITY TO BE HEARD. HE HAS DECLINED,
25 BUT HE HAS SUBMITTED A WRITTEN LETTER WHICH THE COURT HAS,

1 OF COURSE, CONSIDERED AS PART OF THE RECORD.

2 I'LL BEGIN BY MAKING MY RULINGS WITH RESPECT TO
3 THE OBJECTIONS OF THE DEFENDANT.

4 FIRST, WITH RESPECT TO THE OBJECTION TO THE PSR
5 THAT THERE SHOULD NOT BE MORE THAN 250 VICTIM ASSESSMENTS
6 UNDER THE GUIDELINES, THAT OBJECTION IS OVERRULED;

7 MR. KAZARYAN DID, IN FACT, USE A MEANS OF
8 IDENTIFICATION UNLAWFULLY AND WITHOUT AUTHORIZATION TO
9 ACCESS THE ACCOUNTS OF MORE THAN 250 PERSONS WHO ARE ALL
10 VICTIMS WITHIN THE MEANING OF THE GUIDELINES.

11 THE OBJECTION THAT THERE SHOULD BE NO TWO-LEVEL
12 INCREASE FOR SOPHISTICATED MEANS, THAT IS ALSO OVERRULED;

13 THIS IS CLEARLY A SOPHISTICATED USE OF MEANS TO
14 INFILTRATE THE ACCOUNTS OF VARIOUS OTHER INDIVIDUALS AND
15 THEN, THEREAFTER, TO TAKE VARIOUS MEASURES, AS DESCRIBED
16 BY THE GOVERNMENT'S SHOWING IN ITS POSITION PAPERS AS WELL
17 AS THE PSR, TO ACCOMPLISH WHAT IT IS THAT HE WANTED TO
18 ACCOMPLISH. SO THE SOPHISTICATED MEANS ASSESSMENT IS
19 APPROPRIATE, AND I SO FIND.

20 THIS IS NOT DOUBLE-COUNTING AS ASSERTED BY
21 MR. KESSEL BECAUSE, WHILE A COMPUTER CERTAINLY CAN BE
22 ACCESSED IN ALL CASES, IT DOES NOT HAVE TO BE DONE IN SUCH
23 SOPHISTICATED MEANS AS THIS, NOR IS IT APPROPRIATE FOR ME
24 TO SAY THAT JUST BECAUSE LAW ENFORCEMENT IS ABLE TO
25 ULTIMATELY DETECT THIS CRIMINAL ACTIVITY, THAT SOMEHOW

1 THAT MAKES IT UNSOPHISTICATED;

2 IF THAT WERE THE CASE, THEN THE SOPHISTICATED
3 MEANS ASSESSMENT WOULD NEVER BE APPLIED BECAUSE, BY
4 DEFINITION, WE ARE ONLY AT SENTENCING BECAUSE LAW
5 ENFORCEMENT HAS BEEN ABLE TO UNCOVER THE CRIMINAL
6 ACTIVITY.

7 INSOFAR AS THE CRIMINAL HISTORY IS CONCERNED, I
8 AGREE IT SHOULD BE CRIMINAL HISTORY CATEGORY 1.

9 I UNDERSTAND THAT THERE IS NO PRIOR CRIMINAL CONVICTION;

10 NEVERTHELESS, THE GOVERNMENT HAS PRESENTED
11 RELIABLE EVIDENCE IN TERMS OF THE TRANSCRIPTS OF THE
12 PRELIMINARY HEARING AND OTHER EVIDENCE PRESENTED THEREIN
13 SO THAT IT DOES WARRANT THE COURT'S OVERALL CONSIDERATION
14 AS A FACTOR WITHIN THE 3553(A) FACTORS, INCLUDING THE
15 BACKGROUND, CIRCUMSTANCES, AND CHARACTER OF THIS
16 DEFENDANT, AS WELL AS THE NEED TO PROTECT THE PUBLIC FROM
17 FUTURE CRIMES OF THE DEFENDANT.

18 I HAVE ALSO FULLY CONSIDERED THE 3553(A) FACTORS
19 SUGGESTED BY MR. KESSEL IN ALL OF THIS, AND I WILL TAKE
20 ALL THAT INTO CONSIDERATION.

21 INSOFAR AS THE REPLY SAYS THAT THE AGGRAVATED
22 CIRCUMSTANCES HAVE ALREADY BEEN ACCOUNTED FOR IN THE
23 GUIDELINES, THAT SUGGESTION IS REJECTED.

24 THE GUIDELINES DO NOT CONSIDER ADEQUATELY THE
25 NATURE AND EXTENT OF THE WAY THAT THIS CRIME WAS COMMITTED

1 AND THE HUMAN TOLL THAT IT TOOK ON THE VICTIMS BY HIS
2 EGREGIOUS AND TERRORIZING BEHAVIOR.

3 MOREOVER, THE ARGUMENT THAT THE LEVEL OF
4 PSYCHOLOGICAL INJURY IS INSUFFICIENT TO WARRANT UPWARD
5 DEPARTURE UNDER THE GUIDELINES, THAT IS LARGELY IRRELEVANT
6 BECAUSE I CHOOSE TO CONSIDER THE EFFECT OF MR. KAZARYAN'S
7 BEHAVIOR ON THE VICTIMS AS PART OF THE 3553(A) FACTORS
8 RATHER THAN AS A STRICT APPLICATION OF THE GUIDELINES AND
9 WHETHER OR NOT THERE SHOULD BE AN UPWARD DEPARTURE UNDER
10 THE GUIDELINES.

11 WHETHER THE WORDS "SEXTORTION," "EXTORTION," OR
12 "RAPE" APPLY IN THIS CASE I THINK HAS BEEN TOTALLY
13 OVERBLOWN. IT IS NOT CRITICAL TO THIS CASE THAT THIS CASE
14 BE EXTORTION OR BE ACTUAL RAPE. I THINK THE EFFECT OF
15 THIS IS CLEAR, AND THE EFFECT OF THIS CLEARLY COULD
16 WARRANT A VICTIM SAYING THAT SHE FELT THAT SHE HAD BEEN
17 RAPED;

18 SO WE'RE NOT HERE TO REALLY ARGUE WHETHER THE
19 ELEMENTS OF RAPE ARE PRESENT. THAT'S NOT THE CHARGE. AND
20 I THINK THE APPLICATION OF THE WORDS BY THE VICTIM I THINK
21 IS JUSTIFIABLE IN THIS CASE, BUT IT DOESN'T MEAN THAT I'M
22 TREATING THIS AS AN ACTUAL RAPE CASE.

23 INSOFAR AS THE DIFFERENCES BETWEEN THE MIJANGOS
24 CASE AND THIS CASE, I HAVE GIVEN THAT SERIOUS
25 CONSIDERATION, AND I WILL ADDRESS THAT DURING MY OVERALL

1 CONSIDERATION OF THE 3553(A) FACTORS.

2 I BEGIN, THEN, BY CALCULATING THE GUIDELINES AS
3 SUGGESTED.

4 COUNT 12, THERE'S A BASE OFFENSE LEVEL OF 6.

5 I HAVE CONCLUDED THAT THERE ARE MORE THAN 250 VICTIMS, AS
6 DEFINED BY THE GUIDELINES. SO THERE WILL BE A 6-LEVEL
7 INCREASE.

8 I HAVE DETERMINED THAT MR. KAZARYAN DID USE
9 SOPHISTICATED MEANS IN THE COMMISSION OF THIS OFFENSE; SO
10 THERE'S A 2-LEVEL INCREASE.

11 THE PARTIES AGREE THAT THERE SHOULD BE A 2-LEVEL
12 INCREASE UNDER 2B1.1(B)(16), AND I WILL APPLY THAT.

13 I ALSO DISAGREE THAT APPLICATION OF THIS 2-LEVEL
14 INCREASE UNDER 2B1.1(B)(16) IS EFFECTIVELY DOUBLE COUNTING
15 ANY FURTHER CONSIDERATION OF THE CONDUCT BECAUSE THE
16 NATURE OF THE CONDUCT, THE EFFECT IT HAD UPON THE
17 INDIVIDUAL VICTIMS, THE PSYCHOLOGICAL TERROR INFILCTED
18 UPON THEM IS TOTALLY NOT CAPTURED, OR AT LEAST CERTAINLY
19 NOT SUFFICIENTLY CAPTURED, BY THIS 2-LEVEL INCREASE UNDER
20 2B1.1(B)(16).

21 THERE IS A 3-LEVEL DECREASE FOR ACCEPTANCE OF
22 RESPONSIBILITY.

23 OVERALL, OFFENSE LEVEL 13, CRIMINAL HISTORY
24 CATEGORY 1, YIELDING A RECOMMENDED RANGE OF 12 TO 18
25 MONTHS AS TO COUNT 12.

1 COUNT 27, OF COURSE, EVERYONE AGREES, INVOLVES A
2 24-MONTH MANDATORY MINIMUM CONSECUTIVE SENTENCE.

3 SO UNDER THE GUIDELINE CALCULATION, THE RANGE
4 WOULD THUS BE 36 TO 42 MONTHS IN THIS CASE. I AM OF THE
5 VIEW THAT THIS RANGE IS INSUFFICIENT TO ADDRESS THE
6 SERIOUSNESS OF THE CRIME AND THE TRUE NATURE AND
7 CIRCUMSTANCES OF THIS OFFENSE. IT FAILS TO ADEQUATELY
8 TAKE INTO CONSIDERATION, AS I SAID, THE NONMONETARY AND
9 PSYCHOLOGICAL HARM AND FEAR AND TERROR AND THE CALLOUSNESS
10 BY WHICH MR. KAZARYAN INFILCTED THOSE HARMS ON HIS
11 VICTIMS.

12 I HAVE CONSIDERED THE NATURE AND CIRCUMSTANCES
13 OF THIS CASE. IT IS THAT OF AN UNAUTHORIZED ACCESS TO A
14 PROTECTED COMPUTER AND AGGRAVATED IDENTITY THEFT.

15 DEFENDANT GAINED UNAUTHORIZED ACCESS TO THE
16 VICTIMS' EMAIL, FACEBOOK, AND SKYPE ACCOUNTS; CHANGED THE
17 PASSWORDS TO OBTAIN SOLE ACCESS TO THOSE ACCOUNTS FOR A
18 PERIOD OF TIME; AND THEN OBTAINED INFORMATION AND PROPERTY
19 FROM THE VICTIMS' COMPUTERS AND PRETENDED TO BE THE ACCESS
20 VICTIMS, AS THE PROBATION OFFICER CALLS IT, AND CONTACTED
21 THEIR FRIENDS AND ASSOCIATES TO PERSUADE OR TO DEMAND
22 THOSE -- WHAT THE PROBATION OFFICER CALLS THE "DEMAND
23 VICTIMS" -- THAT THEY REMOVE CLOTHING SO THAT HE CAN VIEW
24 THEM AS WELL AS TAKE PICTURES OF THEM.

25 HE BLACKMAILED THE VICTIMS INTO EXPOSING THEIR

1 NAKED OR SEMI-NAKED BODIES BY THREATENING TO EXPOSE SUCH
2 PICTURES IN A PUBLIC FORUM.

3 THE NATURE OF THIS IS, AS I SAID PREVIOUSLY,
4 A KIN TO CYBER TERRORISM THAT INSTILLED GREAT FEAR AND
5 DESPERATION AND DISTRESS ON NUMEROUS VICTIMS. THIS IS NOT
6 A LIMITED OR ISOLATED EPISODE, BUT A FULL-ON ASSAULT
7 AGAINST NUMEROUS PEOPLE OVER A PERIOD OF TIME.

8 HISTORY AND CHARACTERISTICS OF THE DEFENDANT
9 SHOWS THAT HE IS NOW 27 YEARS OLD; HE HAS ACCEPTED
10 RESPONSIBILITY FOR HIS ACTIONS. HE HAS USEFUL SKILLS, BUT
11 UNFORTUNATELY HE HAS USED THOSE SKILLS TO COMMIT CRIMES
12 RATHER THAN FOR LAWFUL PURPOSES.

13 HE HAS HAD PRIOR VARYING EMPLOYMENT. HE DOES
14 NOT HAVE ANY PRIOR CONVICTIONS, BUT HE DOES HAVE A
15 DISTURBING ARREST -- OR REFLECTED DISTURBING FACTS WHICH
16 WE CONSIDER IN THE OVERALL SCHEME OF THINGS.

17 THERE IS A NEED TO REFLECT THE SERIOUSNESS OF
18 THIS OFFENSE, WHICH IS EXTRAORDINARILY SERIOUS. IT CAUSED
19 SERIOUS DISRUPTION AND EMOTIONAL HARM ON AN ONGOING BASIS
20 AS WELL AS FEAR IN MANY OF THE VICTIMS RESULTING IN
21 LONG-LASTING EFFECTS, INCLUDING SEVERAL OF THEM TURNING
22 AWAY FROM ELECTRONIC MEANS OF COMMUNICATION OF THEIR
23 COMPUTERS.

24 I DISAGREE WITH MR. KESSEL IN HIS UNDERSTANDABLE
25 ATTEMPT TO BE AS ZEALOUS ON BEHALF OF HIS CLIENT AS

1 POSSIBLE, BUT I CANNOT AGREE WITH MR. KESSEL TO THE EXTENT
2 THAT THERE'S ANY SUGGESTION THAT SOMEHOW THIS WAS NOT AS
3 SERIOUS AS IT MIGHT HAVE BEEN, THAT THIS DID NOT HAVE THAT
4 MUCH OF A PSYCHOLOGICAL EFFECT ON PEOPLE.

5 "THEY HAD THESE PICTURES ON THEIR COMPUTER
6 ANYWAY." I THINK THAT -- AND I DON'T BLAME COUNSEL FOR IT
7 BECAUSE I DON'T THINK HE IS TRULY INSENSITIVE. I HAVE
8 KNOWN COUNSEL FOR A LONG TIME IN HIS APPEARANCES BEFORE
9 ME, AND I DON'T BELIEVE THAT HE IS AN INSENSITIVE PERSON.
10 BUT I THINK IT DOES MISS THE POINT.

11 REGARDLESS OF WHAT PEOPLE MIGHT DO VOLUNTARILY
12 WITH PEOPLE THAT THEY KNOW, IT IS A TOTALLY, TOTALLY
13 DIFFERENT SITUATION WHEN THOSE PRIVATE MOMENTS THAT THEY
14 CHOOSE TO SHARE WITH THEIR SELECTED PEOPLE ARE NOW SHARED
15 WITH ONES WITH WHOM THEY DO NOT HAVE THAT DESIRE. AND NOW
16 THEY ARE FORCED TO PERFORM IN A DEGRADING MANNER IN FRONT
17 OF A PERSON THEY DO NOT CHOOSE TO DO THIS WITH UNDER THE
18 THREAT THAT THERE WOULD BE EVEN GREATER EXPOSURE OF THEIR
19 PRIVATE MOMENTS.

20 I DON'T KNOW HOW -- WE ALL HAVE PRIVATE MOMENTS.
21 WE ALL HAVE INTIMATE MOMENTS WITH OUR SPOUSES OR WHATEVER.
22 IMAGINE IF THOSE MOMENTS WERE THREATENED TO BE PUT ON THE
23 INTERNET OR PUT ON SOMEBODY'S FACEBOOK. I DON'T THINK
24 THAT JUSTIFIES THE FACT THAT WE HAVE INTIMATE MOMENTS. I
25 THINK IT IS, IF ANYTHING, OUTRAGEOUS CONDUCT THAT ATTEMPTS

1 TO STRIP AWAY A REALLY SERIOUS LEVEL OF HUMANITY WHICH WE
 2 MUST BE ALLOWED TO HAVE, OUR PRIVATE MOMENTS WITH PERSONS
 3 OF OUR CHOOSING. HE STRIPPED, LITERALLY, THE VICTIMS OF
 4 THAT RIGHT. THAT MAKES THIS A VERY SERIOUS CRIME.

5 THERE IS ALSO A NEED TO PROMOTE RESPECT FOR THE
 6 LAW, WHICH IS MUCH NEEDED IN THIS CASE. ALTHOUGH
 7 MR. KAZARYAN HAS NO PRIOR CONVICTION, HIS REPEATED AND
 8 CALLOUS VIOLATIONS OF THE VICTIMS' PRIVACY INTERESTS SHOW
 9 THAT HE DOES HAVE A SERIOUS LACK OF RESPECT FOR THE LAW.

10 MOREOVER, DEFENDANT COMMITTED THIS OFFENSE WHILE
 11 THE OTHER CRIMINAL PROCEEDINGS WERE PENDING, SHOWING MORE
 12 DISRESPECT FOR THE LAW.

13 THERE IS A NEED TO PROVIDE JUST PUNISHMENT AND
 14 TO AFFORD ADEQUATE DETERRENCE.

15 SPECIFIC DETERRENCE IS PARTICULARLY NEEDED. HE
 16 MUST KNOW THAT THESE ARE SERIOUS MATTERS THAT CANNOT BE
 17 REPEATED AND CANNOT BE REMEDIED BY MERE LIGHT SENTENCES.

18 GENERAL DETERRENCE IS PARTICULARLY NEEDED
 19 BECAUSE SOCIETY MUST SIMPLY KNOW THAT DESPITE THIS DAY AND
 20 AGE OF COMPUTERS AND ELECTRONIC MEANS, THIS TYPE OF
 21 EGREGIOUS BEHAVIOR HAS NO PLACE AND WILL RESULT IN SERIOUS
 22 CONSEQUENCES.

23 THERE IS A NEED TO PROTECT THE PUBLIC FROM
 24 FUTURE CRIMES BY THIS DEFENDANT.

25 MY VIEW IS THAT UNLESS HE'S ADEQUATELY DETERRED,

1 THE DEFENDANT IS LIKELY TO RECIDIVATE BECAUSE HE DOES NOT
2 APPEAR TO ME TO LEARN EASILY FROM HIS PRIOR BRUSHES WITH
3 THE LAW.

4 EDUCATION, VOCATIONAL TRAINING, MEDICAL CARE,
5 AND CORRECTIONAL TREATMENT DO NOT APPEAR TO BE APPLICABLE
6 IN THIS CASE. THE COURT HAS AVAILABLE TO IT THE FULL
7 RANGE OF SENTENCES, EXCEPT THAT COUNT 27 DOES REQUIRE,
8 UNDER ANY CIRCUMSTANCES, A 24-MONTH MANDATORY MINIMUM
9 CONSECUTIVE SENTENCE.

10 I HAVE CONSIDERED ALL RELEVANT POLICY
11 STATEMENTS, INCLUDING THE POLICY STATEMENTS SUGGESTING
12 THAT IT MAY BE APPROPRIATE TO HAVE UPWARD DEPARTURE EVEN
13 WITHIN THE MEANING OF THE GUIDELINES TO CAPTURE THE HARM
14 OF A NONMONETARY NATURE THAT EXISTS IN THIS CASE.

15 RESTITUTION IS NOT AN ISSUE.

16 I HAVE CAREFULLY CONSIDERED THE NEED TO AVOID
17 UNWARRANTED SENTENCING DISPARITIES. I DON'T HAVE THE
18 OTHER CASES BEFORE ME. THOSE WERE NOT MY CASES. THE ONLY
19 CASE THAT WAS BEFORE ME WAS THE MIJANGOS CASE, AND I HAVE
20 CAREFULLY CONSIDERED THE PLUSSES AND MINUSES OF THAT CASE.

21 I DO FIND THAT THERE ARE INSTANCES WHERE
22 MR. MIJANGOS' CASE SUGGESTS MORE EGREGIOUS BEHAVIOR, AND
23 THEN THERE ARE OTHER INSTANCES WHERE MR. KAZARYAN'S CASE
24 SUGGESTS MORE EGREGIOUS BEHAVIOR.

25 FOR INSTANCE, MUCH MORE NUMBER OF VICTIMS AS TO

1 MR. KAZARYAN; MORE PUBLIC POSTINGS THAN THE INSTANCE OF A
2 POSTING, SINGULAR POSTING, AS I RECALL ON THE MYSPACE PAGE
3 AS TO MR. MIJANGOS.

4 ON THE OTHER HAND, MR. MIJANGOS ALSO HAD SERIOUS
5 MEDICAL ISSUES WHICH AFFECT THE SEVERITY OF HIS PUNISHMENT
6 WHILE IN CUSTODY, WHICH MR. KAZARYAN DOES NOT HAVE.

7 BUT ON THE OTHER HAND, MR. MIJANGOS ALSO HAD THE
8 MORE EGREGIOUS BEHAVIOR, WHICH WE ALL RECOGNIZE. HE USED
9 HIGHER TECHNICAL SKILL IN INSTALLING THIS MAL-WARE IN
10 ORDER TO GAIN ACCESS. HE ALSO OBTAINED FINANCIAL
11 INFORMATION, WHICH MR. KAZARYAN DID NOT DO.

12 MR. MIJANGOS ALSO WAS HERE ILLEGALLY.

13 MR. MIJANGOS ALSO WARRANTED AN UPWARD ADJUSTMENT FOR
14 OBSTRUCTION OF JUSTICE, WHICH THERE IS NO EVIDENCE TO
15 APPLY THAT ADJUSTMENT AS TO MR. KAZARYAN.

16 HAVING, THEREFORE, CAREFULLY CONSIDERED ALL OF
17 THE RELEVANT FACTORS, I DO CONCLUDE THAT A GUIDELINE
18 SENTENCE IS INSUFFICIENT FOR ALL THE REASONS THAT I HAVE
19 SET FORTH.

20 THE FOLLOWING, THEN, IS THE SENTENCE OF THE
21 COURT.

22 *IT IS ORDERED THAT DEFENDANT SHALL PAY*
23 *THE UNITED STATES A SPECIAL ASSESSMENT OF \$200,*
24 *WHICH IS DUE IMMEDIATELY.*

25 *ANY UNPAID BALANCE SHALL BE DUE DURING*

1 THE PERIOD OF IMPRISONMENT AT A RATE OF NOT LESS
2 THAN \$25 PER QUARTER AND PURSUANT TO THE BUREAU OF
3 PRISONS' INMATE FINANCIAL RESPONSIBILITY PROGRAM.

4 ALL FINES ARE WAIVED AS IT IS FOUND THAT
5 THE DEFENDANT DOES NOT HAVE AN ABILITY TO PAY A
6 FINE.

7 IT IS THE JUDGMENT OF THE COURT THAT
8 DEFENDANT, KAREN KAZARYAN, IS HEREBY COMMITTED ON
9 COUNTS 12 AND 27 OF THE INDICTMENT TO THE CUSTODY
10 OF THE BUREAU OF PRISONS TO BE IMPRISONED FOR A
11 TOTAL OF 60 MONTHS. THIS TOTAL CONSISTS OF
12 36 MONTHS ON COUNT 12 TO BE SERVED CONSECUTIVELY
13 TO THE TERM OF 24 MONTHS IMPOSED ON COUNT 27,
14 WHICH SHALL TOTAL 60 MONTHS.

15 THE COURT RECOMMENDS THAT THE BUREAU OF
16 PRISONS CONDUCT A MENTAL HEALTH EVALUATION OF THE
17 DEFENDANT TO PROVIDE ALL NECESSARY TREATMENT.

18 UPON RELEASE FROM IMPRISONMENT,
19 DEFENDANT SHALL BE PLACED ON SUPERVISED RELEASE
20 FOR A TERM OF THREE YEARS. THIS TERM CONSISTS OF
21 THREE YEARS ON COUNT 12 AND ONE YEAR ON COUNT 27,
22 TO RUN CONCURRENTLY UNDER THE FOLLOWING TERMS AND
23 CONDITIONS:

24 1. DEFENDANT SHALL COMPLY WITH THE
25 RULES AND REGULATIONS OF THE U.S. PROBATION OFFICE

1 AND GENERAL ORDER 05-02;

2 2. DEFENDANT SHALL REFRAIN FROM ANY
3 UNLAWFUL USE OF A CONTROLLED SUBSTANCE. THE
4 DEFENDANT SHALL SUBMIT TO ONE DRUG TEST WITHIN
5 15 DAYS OF RELEASE FROM IMPRISONMENT AND AT LEAST
6 TWO PERIODIC DRUG TESTS THEREAFTER, NOT TO EXCEED
7 EIGHT TESTS PER MONTH AS DIRECTED BY THE PROBATION
8 OFFICER;

9 3. DEFENDANT SHALL PARTICIPATE IN
10 OUTPATIENT SUBSTANCE ABUSE TREATMENT AND
11 COUNSELING THAT INCLUDES URINALYSIS, BREATH AND/OR
12 SWEAT-PATCH TESTING AS DIRECTED BY THE PROBATION
13 OFFICER. DEFENDANT SHALL ABSTAIN FROM USING
14 ILLICIT DRUGS AND ALCOHOL AND ABUSING PRESCRIPTION
15 MEDICATION DURING THE PERIOD OF SUPERVISION;

16 4. DURING THE COURSE OF THE
17 SUPERVISION, THE PROBATION OFFICER, WITH THE
18 AGREEMENT OF DEFENDANT AND HIS COUNSEL, MAY PLACE
19 THE DEFENDANT IN A RESIDENTIAL DRUG TREATMENT
20 PROGRAM APPROVED BY THE UNITED STATES PROBATION
21 OFFICE FOR TREATMENT OF NARCOTIC ADDICTION OR DRUG
22 DEPENDENCY, WHICH MAY INCLUDE COUNSELING AND
23 TESTING TO DETERMINE IF THE DEFENDANT HAS REVERTED
24 TO THE USE OF DRUGS. AND THE DEFENDANT SHALL
25 RESIDE IN THAT TREATMENT PROGRAM UNTIL DISCHARGED

1 BY THE PROGRAM DIRECTOR AND THE PROBATION OFFER;

2 5. DEFENDANT SHALL PARTICIPATE IN
3 MENTAL HEALTH TREATMENT, WHICH MAY INCLUDE
4 EVALUATION AND COUNSELING, UNTIL DISCHARGED BY THE
5 TREATMENT PROVIDER, WITH THE APPROVAL OF THE
6 PROBATION OFFICER;

7 6. AS DIRECTED BY THE PROBATION
8 OFFICER, THE DEFENDANT SHALL PAY ALL OR PART OF
9 THE COST OF TREATING HIS SUBSTANCE ABUSE AND
10 MENTAL HEALTH TREATMENT TO THE AFTERCARE
11 CONTRACTOR DURING THE PERIOD OF COMMUNITY
12 SUPERVISION. DEFENDANT SHALL PROVIDE PAYMENT AND
13 PROOF OF PAYMENT AS DIRECTED BY THE PROBATION
14 OFFICER;

15 7. DURING THE PERIOD OF COMMUNITY
16 SUPERVISION, DEFENDANT SHALL PAY THE SPECIAL
17 ASSESSMENT IN ACCORDANCE WITH THIS JUDGMENT'S
18 ORDERS PERTAINING TO SUCH PAYMENT;

19 8. DEFENDANT SHALL NOT OBTAIN OR
20 POSSESS ANY DRIVER'S LICENSE, SOCIAL SECURITY
21 NUMBER, BIRTH CERTIFICATE, PASSPORT, OR ANY OTHER
22 FORM OF IDENTIFICATION IN ANY NAME OTHER THAN HIS
23 TRUE LEGAL NAME, NOR SHALL THE DEFENDANT USE FOR
24 ANY PURPOSE OR ANY MANNER ANY NAME OTHER THAN HIS
25 TRUE LEGAL NAME OR NAMES WITHOUT THE PRIOR

1 APPROVAL OF THE PROBATION OFFICER;

2 9. DEFENDANT SHALL COOPERATE IN THE

3 COLLECTION OF A D.N.A. SAMPLE FROM HIM;

4 10. BEFORE USING ANY COMPUTER OR

5 COMPUTER-RELATED DEVICE CAPABLE OF ACCESSING THE

6 INTERNET, SCREEN NAME, PASSWORD, EMAIL ACCOUNT, OR

7 I.S.P. FOR THE FIRST TIME, THE DEFENDANT SHALL

8 NOTIFY HIS PROBATION OFFICER.

9 COMPUTER AND COMPUTER-RELATED DEVICES

10 INCLUDE BUT ARE NOT LIMITED TO PERSONAL COMPUTERS,

11 PERSONAL DATA ASSISTANCE, INTERNET APPLIANCES,

12 ELECTRONIC GAMES, AND CELLULAR TELEPHONES, AS WELL

13 AS THEIR PERIPHERAL EQUIPMENT THAT CAN ACCESS OR

14 BE MODIFIED TO ACCESS THE INTERNET, ELECTRONIC

15 BULLETIN BOARDS, AND OTHER COMPUTER OR SIMILAR

16 MEDIA;

17 11. AFTER NOTIFYING HIS PROBATION

18 OFFICER ABOUT A PARTICULAR COMPUTER,

19 COMPUTER-RELATED DEVICE, SCREEN NAME, PASSWORD,

20 EMAIL ACCOUNT, OR ISP, DEFENDANT NEED NOT NOTIFY

21 HIS PROBATION OFFICER ABOUT SUBSEQUENT USE OF THAT

22 PARTICULAR ITEM.

23 DEFENDANT SHALL, HOWEVER, NOTIFY HIS

24 PROBATION OFFICER OF ANY ADDITIONS TO, REMOVALS

25 FROM, UPGRADES OF, UPDATES OF, REINSTALLATIONS OF,

1 REPAIRS OF, OR OTHER MODIFICATIONS OF THE HARDWARE
2 OR SOFTWARE ON ANY COMPUTERS, COMPUTER-RELATED
3 DEVICES, OR PERIPHERAL EQUIPMENT IN THE
4 AFOREMENTIONED ITEMS WITHIN ONE WEEK OF THE
5 CHANGE;

6 12. DEFENDANT SHALL PROVIDE HIS
7 PROBATION OFFICER WITH ALL BILLING RECORDS FOR
8 PHONE, CABLE, INTERNET, AND SATELLITE SERVICES
9 THAT HE PURCHASED AS REQUESTED BY THE PROBATION
10 OFFICER SO THAT THE PROBATION OFFICER CAN VERIFY
11 HIS COMPLIANCE WITH THESE REQUIREMENTS;

12 13. ALL COMPUTERS AND COMPUTER-RELATED
13 DEVICES AND THEIR PERIPHERAL EQUIPMENT USED BY
14 DEFENDANT SHALL BE SUBJECT TO SEARCH AND SEIZURE
15 BY MAKING A MIRROR IMAGE OF THE DEVICE OR
16 SEARCHING THE COMPUTER ON SITE.

17 DEFENDANT SHALL NOT HIDE OR ENCRYPT
18 FILES OR DATA WITHOUT PRIOR APPROVAL FROM THE
19 PROBATION OFFICER;

20 14. DEFENDANT SHALL NOT KNOWINGLY
21 CONTACT OR ATTEMPT TO CONTACT ANY OF THE VICTIMS
22 IN THIS CASE OR PERSONS KNOWN TO DEFENDANT TO BE
23 THE VICTIMS' FAMILIES, INCLUDING BUT NOT LIMITED
24 TO THEIR PARENTS, SIBLINGS, OTHER RELATIVES, ANY
25 SPOUSES OR SIGNIFICANT OTHERS WITH WHOM THE

1 VICTIMS MAY SHARE AN INTIMATE RELATIONSHIP,
2 WHETHER EXISTING NOW OR DURING THE PENDENCY OF ANY
3 TERM OF SUPERVISED RELEASE, AND ANY CHILDREN OF
4 THE VICTIM, WHETHER EXISTING NOW OR DURING THE
5 PENDENCY OF THE TERM OF SUPERVISED RELEASE --
6 THESE INDIVIDUALS ARE COLLECTIVELY DEFINED AS
7 'VICTIMS' FAMILIES' -- DIRECTLY OR INDIRECTLY BY
8 ANY MEANS, INCLUDING BUT NOT LIMITED TO IN PERSON,
9 BY MAIL, TELEPHONE, EMAIL, TEXT MESSAGE, OR
10 OTHERWISE VIA THE INTERNET OR OTHER ELECTRONIC
11 MEANS OR THROUGH A THIRD PARTY;

12 15. DEFENDANT SHALL NOT ATTEMPT TO
13 LOCATE THE VICTIMS OR THE VICTIMS' FAMILIES OR
14 ATTEMPT TO OBTAIN INFORMATION CONCERNING THE
15 WHEREABOUTS, PHONE NUMBERS, EMAIL ADDRESSES, OR
16 OTHER PERSONAL IDENTIFIERS OF THE VICTIMS OR THE
17 VICTIMS' FAMILIES;

18 16. DEFENDANT SHALL REMAIN AT LEAST
19 100 YARDS AWAY FROM THE VICTIMS AT ALL TIMES;

20 17. DEFENDANT SHALL NOT POSSESS OR
21 ATTEMPT TO POSSESS ANY MATERIALS WHETHER IN HARD
22 COPY, DIGITAL, ELECTRONIC, OR ANY OTHER FORM, THAT
23 DEPICT SEXUALLY EXPLICIT AND/OR NUDE IMAGES OF THE
24 VICTIMS AND/OR THAT CONTAIN PERSONAL IDENTIFYING
25 INFORMATION, INCLUDING ANY ACCESS DEVICE AND BANK

1 OR CREDIT CARD ACCOUNT NUMBERS OF THE VICTIMS;

2 THE COURT AUTHORIZES THE PROBATION

3 OFFICER TO DISCLOSE THE PRESENTENCE REPORT TO THE

4 SUBSTANCE ABUSE TREATMENT PROVIDER TO FACILITATE

5 THE DEFENDANT'S TREATMENT FOR NARCOTIC ADDICTION

6 OR DRUG DEPENDENCY. FURTHER RE-DISCLOSURE OF THE

7 PRESENTENCE REPORT BY THE TREATMENT PROVIDER IS

8 PROHIBITED WITHOUT THE CONSENT OF THE COURT;

9 THE COURT ALSO AUTHORIZES THE PROBATION

10 OFFICE TO DISCLOSE THE PRESENTENCE REPORT AND/OR

11 ANY PREVIOUS MENTAL HEALTH OR EVALUATIONS OR

12 REPORTS TO THE TREATMENT PROVIDER;

13 THE TREATMENT PROVIDER MAY PROVIDE ANY

14 INFORMATION, EXCLUDING THE PRESENTENCE REPORT, TO

15 STATE OR LOCAL SOCIAL SERVICES AGENCIES FOR THE

16 PURPOSES OF THE DEFENDANT'S REHABILITATION.

17 (PAUSE IN THE PROCEEDINGS.)

18 **THE COURT:** MS. WILKINSON, I BELIEVE THAT THERE

19 ARE OTHER COUNTS TO DISPOSE OF AT THIS TIME.

20 **MS. WILKINSON:** YES, YOUR HONOR. THE GOVERNMENT

21 WOULD MOVE TO DISMISS COUNTS 1 THROUGH 11, 13 THROUGH 15,

22 16 THROUGH 26, AND 28 THROUGH 30 IN THE INTEREST OF

23 JUSTICE.

24 **THE COURT:** THAT MOTION IS GRANTED.

25 MR. KAZARYAN, YOU ARE ADVISED THAT YOU HAVE THE

1 RIGHT TO APPEAL THE SENTENCE WHICH THE COURT HAS JUST
2 IMPOSED UPON YOU.

3 IF YOU WISH TO DO SO, YOU SHOULD DISCUSS THIS
4 MATTER WITH YOUR LAWYER WHO WILL ASSIST YOU IN THE FILING
5 OF A TIMELY NOTICE OF APPEAL; AND IF YOU DO NOT HAVE THE
6 MONEY TO PAY FOR THAT APPEAL, YOU HAVE THE RIGHT, UPON
7 PROPER APPLICATION, TO ASK THE COURT TO WAIVE THOSE COSTS.

8 DO YOU UNDERSTAND THAT?

9 **THE DEFENDANT:** YES, YOUR HONOR.

10 **THE COURT:** ALL RIGHT.

11 **MR. KESSEL:** MAY I ADDRESS THE COURT ON A COUPLE
12 OTHER SENTENCING CONSIDERATIONS?

13 **THE COURT:** YES.

14 **MR. KESSEL:** THANK YOU, YOUR HONOR.

15 ONE, I WOULD ASK THE COURT TO RECOMMEND TO THE
16 BUREAU OF PRISONS DEFENDANT'S PARTICIPATION IN THE
17 500-HOUR R.D.A.P. PROGRAM, YOUR HONOR. I THINK IT'S
18 APPROPRIATE, AND I THINK IT WOULD BE REHABILITATIVE, AND
19 IT DOVETAILS WITH SOME OF THE RECOMMENDATIONS ABOUT DRUG
20 USE.

21 TWO, YOUR HONOR, WE WOULD RECOMMEND -- FAMILY
22 HERE, IF THE COURT WOULD RECOMMEND A FACILITY IN SOUTHERN
23 CALIFORNIA.

24 AND, THREE, WE WOULD BE ASKING FOR A
25 SELF-SURRENDER, YOUR HONOR. THE DEFENDANT HAS BEEN ON

1 HOME DETENTION FOR -- I BELIEVE IT'S COMING ON NINE MONTHS
2 NOW. THERE HAS BEEN NO TRANSGRESSIONS. HE'S COMPLIED
3 WITH EVERY CONDITION, YOUR HONOR; AND I WOULD ASK THAT HE
4 BE ALLOWED TO FURTHER THAT CONDITION AND BE GIVEN A
5 SURRENDER DATE, YOUR HONOR.

6 **THE COURT:** ALL RIGHT.

7 MS. WILKINSON, DO YOU WISH TO BE HEARD ON ANY OF
8 THOSE?

9 **MS. WILKINSON:** ON THE SELF-SURRENDER DATE, YES,
10 YOUR HONOR. THE GOVERNMENT DOES MOVE FOR A REMAND IN THIS
11 CASE UNDER 3143, I THINK IT IS, (B).

12 THIS IS POST-SENTENCING, AND SO THE BURDEN HAS
13 SHIFTED, AND I THINK THAT IT WAS A CLOSE CALL. THE
14 GOVERNMENT HAD MOVED FOR DETENTION BELOW, AND I THINK IT
15 WAS A CLOSE CALL THEN. AND I THINK NOW THE BURDEN HAS
16 SHIFTED, AND THAT THERE ISN'T A SORT OF SECONDARY FINDING
17 THAT NEEDS TO BE MADE UNDER THAT SUBSECTION (B) THAT THERE
18 BE -- YOU KNOW, HE'S NOT GOING TO GET TIME IN CUSTODY,
19 THERE'S A GOOD ISSUE FOR APPEAL -- IN THIS CASE, I THINK
20 THAT REMAND IS APPROPRIATE.

21 **THE COURT:** ALL RIGHT.

22 MR. KESSEL, DO YOU WANT TO BE HEARD FURTHER ON
23 THAT?

24 **MR. KESSEL:** YOUR HONOR, HAVING HAD SELF-REMAND
25 IN MANY CASES, I KNOW IT'S DISCRETIONARY. I KNOW THERE'S

1 SOME STATUTORY GUIDANCE.

2 BUT I WOULD NOTE TWO THINGS, YOUR HONOR, AND I
3 DON'T KNOW IF THERE'S ISSUES ON APPEAL -- THERE'S ALWAYS
4 ISSUES ON APPEAL. THE QUESTION IS WHETHER THERE'S MERIT
5 OR NOT. THERE'S ISSUES THAT WE RAISED, I SHOULD SAY, IN
6 OUR SENTENCING ON ADJUSTMENTS, AND WE RESPECT WHAT THE
7 COURT FOUND AND GAVE FACTUAL BASIS.

8 WHAT I'M CONCERNED WITH, YOUR HONOR, IS ALLOWING
9 THE DEFENDANT, WHO HAS REMAINED OUT, TO SELF-SURRENDER
10 BECAUSE OF THE SITUATION WHERE THERE'S BEEN NO VIOLATIONS
11 OF HIS RELEASE. A BENCH OFFICER DID ALLOW HIM TO BE
12 RELEASED PRETRIAL, YOUR HONOR, ON NOT ONLY HOME DETENTION,
13 HIS AUNT, WHO IS PRESENT, ALSO PROFFERED HER HOUSE AS
14 SECURITY, WHICH IS STILL IN PLACE, YOUR HONOR. AND WE
15 WOULD BE ASKING FOR THOSE REASONS.

16 THERE IS NO CONCERN THAT I KNOW OF THAT HE'S
17 CONTACTED ANY OF THE VICTIMS, THAT HE HAS USED A COMPUTER
18 PER THE PRETRIAL RELEASE CONDITIONS, YOUR HONOR, AND WE
19 WOULD ASK FOR SELF-SURRENDER IN THIS CASE ON THOSE
20 REASONS, YOUR HONOR.

21 **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH.

22 WITH RESPECT TO YOUR REQUEST THAT THE BUREAU OF
23 PRISONS BE ASKED TO CONSIDER HIM FOR THE R.D.A.P. PROGRAM,
24 I WILL RECOMMEND TO THE BUREAU OF PRISONS THAT TO THE
25 EXTENT IT CONSIDERS IT APPROPRIATE, MR. KAZARYAN BE

1 CONSIDERED FOR ENROLLMENT IN THE R.D.A.P. PROGRAM.

2 WITH RESPECT TO THE RECOMMENDATION FOR LOCATION
3 OF CONFINEMENT --

4 YOU WANT ME TO RECOMMEND IN THE CALIFORNIA AREA
5 OR SOUTHERN CALIFORNIA AREA?

6 **MR. KESSEL:** DOES YOUR HONOR EVER SUGGEST A
7 PARTICULAR INSTITUTION?

8 **THE COURT:** I CAN, BUT IT'S UP TO THEM, BUT I
9 CERTAINLY CAN.

10 **MR. KESSEL:** EITHER F.C.I. LOMPOC OR F.C.I.
11 TERMINAL ISLAND, OR IN THE ALTERNATIVE, A
12 SOUTHERN CALIFORNIA INSTITUTION.

13 **THE COURT:** I WILL RECOMMEND TO THE BUREAU OF
14 PRISONS, TO THE EXTENT THEY FIND IT APPROPRIATE, THAT
15 MR. KAZARYAN BE CONSIDERED FOR DESIGNATION TO EITHER
16 LOMPOC OR TERMINAL ISLAND, OR FAILING WHICH, A FACILITY IN
17 THE SOUTHERN CALIFORNIA AREA IN ORDER TO FACILITATE FAMILY
18 VISITATION.

19 **MR. KESSEL:** THANK YOU, YOUR HONOR.

20 **THE COURT:** WITH RESPECT TO THE REQUEST FOR
21 SELF-SURRENDER, MR. KESSEL, AS YOU KNOW, UNDER 18 UNITED
22 STATES CODE, SECTION 3143(B), BECAUSE THIS IS NOW PENDING
23 APPEAL POST-SENTENCING, THE LAW REQUIRES ME TO REMAND
24 MR. KAZARYAN UNLESS CERTAIN THINGS ARE SHOWN.

25 AND THE FACTORS ARE THAT, ONE, YOU MUST SHOW ME

1 BY CLEAR AND CONVINCING EVIDENCE THAT HE'S NOT LIKELY TO
2 FLEE OR TO POSE A DANGER TO THE SAFETY OF ANOTHER PERSON
3 OR TO THE COMMUNITY.

4 I MIGHT BE ABLE TO FIND THAT IN THIS CASE BASED
5 UPON SOME OF THE THINGS THAT YOU HAVE ARGUED THAT HE HAS
6 COMPLIED WITH, PRETRIAL SUPERVISION AND SO FORTH, BUT
7 THERE IS A CONJUNCTIVE REQUIREMENT, WHICH IS THAT IN
8 ADDITION TO MAKING THAT SHOWING, YOU MUST ALSO MAKE THE
9 SHOWING THAT THE APPEAL -- STRIKE THAT.

10 YOU MUST MAKE THAT SHOWING SO THAT I CAN MAKE
11 THAT FINDING, BUT YOU MUST MAKE A SHOWING SO THAT I CAN
12 MAKE A FINDING THAT THE APPEAL WOULD NOT BE FOR PURPOSES
13 OF DELAY AND WOULD RAISE A SUBSTANTIAL QUESTION OF LAW AND
14 FACT -- THAT'S NOT IT. IT HAS TO GO FARTHER -- THAT IT
15 DOES NOT RAISE A SUBSTANTIAL QUESTION OF LAW AND FACT THAT
16 IS LIKELY TO RESULT IN REVERSAL.

17 THERE IS NO REVERSAL. HE PLED GUILTY.

18 ORDER FOR NEW TRIAL. HE PLED GUILTY. THERE IS
19 NO ORDER FOR NEW TRIAL.

20 A SENTENCE DOES NOT INCLUDE A TERM OF
21 IMPRISONMENT. THAT'S NOT GOING TO HAPPEN BECAUSE THERE'S
22 A MANDATORY MINIMUM SENTENCE OF AT LEAST 25 MONTHS, AND
23 YOU'VE EVEN SUGGESTED 30 MONTHS OR A REDUCED SENTENCE TO A
24 TERM OF IMPRISONMENT LESS THAN THE TOTAL TIME ALREADY
25 SERVED PLUS THE EXPECTED DURATION OF THE APPEAL PROCESS.

1 HE HAS SERVED WHAT?

2 **MR. KESSEL:** TWO MONTHS, I BELIEVE, YOUR HONOR.

3 **THE COURT:** TWO MONTHS. AND CERTAINLY THE
4 APPEAL PROCESS I DO NOT THINK WILL TAKE 28 MONTHS OR EVEN
5 22 MONTHS.

6 SO BASED UPON MY READING OF 3143(B) AND THE
7 REQUIREMENTS OF THE LAW IN THE MANDATORY LANGUAGE, BECAUSE
8 THE LAW SAYS I SHALL DO THIS -- NOT THAT I HAVE DISCRETION
9 OR I CAN CONSIDER IT, BUT I SHALL DO THIS, YOUR REQUEST
10 FOR SELF-SURRENDER IS DENIED.

11 MR. KAZARYAN IS NOW REMANDED TO THE CUSTODY OF
12 THE UNITED STATES MARSHAL.

13 MS. WILKINSON, ANYTHING FURTHER AT THIS TIME?

14 **MS. WILKINSON:** NO, YOUR HONOR. THANK YOU.

15 **THE COURT:** MR. KESSEL, ANYTHING FURTHER AT THIS
16 TIME?

17 **MR. KESSEL:** I'M SORRY, YOUR HONOR?

18 **THE COURT:** ANYTHING FURTHER?

19 **MR. KESSEL:** NO, YOUR HONOR. THANK YOU FOR THE
20 COURT'S TIME.

21 **THE COURT:** ALL RIGHT.

22 **THE CLERK:** THIS COURT NOW STANDS IN RECESS.

23 (PROCEEDINGS CONCLUDED.)

24 --OOO--

25

1 CERTIFICATE
2

3 I HEREBY CERTIFY THAT PURSUANT TO SECTION 753,
4 TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND
5 CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED
6 PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE
7 TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE
8 REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED
9 STATES.

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11 DATED THIS 7TH DAY OF FEBRUARY, 2014.

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13 /S/ MARY RIORDAN RICKEY
14 MARY RIORDAN RICKEY
OFFICIAL COURT REPORTER

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